Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

MAURICE A. MASON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE — NO EXECUTION DATE SET

QUESTION PRESENTED

Did the Sixth Circuit exceed its authority under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it concluded that trial counsel provided ineffective assistance at sentencing instead of deferring to the Ohio Supreme Court's objectively reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

LIST OF PARTIES

The Petitioner is Keith Smith, the Warden of the Mansfield Correctional Institution. Smith is substituted for his predecessor, Betty Mitchell. See Fed. R. Civ. P. 25(d).

The Respondent is Maurice Mason, an inmate at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Keith Smith, the Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit in this case. In the alternative, the petitioner respectfully requests that this petition be held pending the Court's decision in *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak*, 2009 U.S. Lexis 1536 (Feb. 23, 2009), which also presents the issue of ineffective assistance of counsel in the AEDPA context.

OPINIONS BELOW

The United States District Court for the Northern District of Ohio's order granting a conditional writ is reproduced at App. 1a-2a. The Sixth Circuit's opinion ordering the district court to grant a conditional writ is reproduced at App. 5a-59a. The district court's opinion and order denying the writ after conducting an evidentiary hearing on Mason's claim of ineffective assistance at mitigation is reproduced at App. 60a-104a. The Sixth Circuit's opinion and order remanding the case to the district court for an evidentiary hearing is reproduced at App. 105a-187a. The district court's initial opinion and order denying habeas relief is reproduced at App. 188a-296a. The Ohio Supreme Court's opinion affirming Mason's conviction and sentence on direct review is reproduced at App. 297a-344a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit denied the State's petition for rehearing on February 19, 2009. Justice Stevens

extended the time period to file a petition for writ of certiorari to July 20, 2009. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the evidence

presented in the State court proceedings.

INTRODUCTION

After significantly investigating possible mitigating evidence, Respondent Maurice A. Mason's trial counsel faced a dilemma in selecting a mitigation strategy. Counsel knew the prosecution hoped to introduce evidence that Mason raped a young woman only months before the rape and murder for which Mason was being sentenced, as well as evidence of Mason's prior convictions and long history of drug use. Counsel also knew that Ohio law permits prosecutors "to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false," *Ohio v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988), and he reasonably believed the trial judge had a "hair trigger" approach to allowing rebuttal evidence, J.A. 1737. Thus, even though counsel knew that Mason's background might yield mitigating evidence, counsel had to decide whether the benefits of that evidence outweighed the risk of opening the door to the prosecutor's powerful rebuttal evidence. Counsel decided the risks outweighed the benefits and selected a mitigation strategy that did not involve Mason's background. Consistent with that strategy, counsel stopped investigating Mason's background.

The Sixth Circuit Court of Appeals granted Mason habeas relief, concluding that Mason received ineffective assistance of counsel at mitigation. In doing so, the Sixth Circuit refused to give deference to trial counsel's reasonable strategic decision, cf. *Strickland v. Washington*, 466 U.S. 668, 689 (1984),

and instead closely scrutinized both counsel's mitigation strategy and his corresponding decision to limit his mitigation investigation. The Sixth Circuit simultaneously refused to defer to the Ohio Supreme Court's resolution of Mason's ineffective assistance claim, in direct contravention of AEDPA. Instead, the federal court rejected the state court's conclusion that trial counsel's performance was constitutionally sufficient and that Mason did not establish prejudice. The standard articulated by the Sixth Circuit places trial counsel in the impossible position of having to choose between providing ineffective assistance in one of two ways: either by opening the door to damaging rebuttal by introducing mitigating evidence, or by failing to introduce mitigating evidence that may help the defendant.

This Court should grant review and reverse the Sixth Circuit's opinion ordering the issuance of a conditional writ.

STATEMENT OF THE CASE

A. Mason raped and murdered a nineteen-year-old woman.

On February 8, 1993, 19-year-old Robin Dennis disappeared. App. 7a-8a. According to her missing persons report, Dennis was last seen with Maurice A. Mason. App. 8a. Dennis and her husband had socialized with Mason and other friends on the morning of her disappearance. At that time, Dennis's husband discussed trading his .22 caliber Colt Frontier Scout revolver for Mason's television. *Id.*

The day after Dennis was reported missing, police received a report of an abandoned car in rural

Marion County, Ohio. *Id.* When police investigated, they found Chevron-style shoe impressions, similar to those made by shoes owned by Mason and Dennis, on the passenger side of the car's dashboard and outside the passenger door. *Id.* They also found Type B blood, Dennis's blood type, on the passenger door. A set of keys, including a key that fit a car owned by Mason's wife, was on the car's front passenger seat. *Id.*

Dennis's body was found several days later in an abandoned building. The building was located approximately an 18-minute walk from the abandoned car. App. 9a. Dennis was wearing only a bra, and her underwear and jeans were around her ankles and lower legs. Her head, face and body were covered with bruises. *Id.* Dennis's car keys, t-shirt, and jacket, covered with burrs and debris, were eight feet from her body. *Id.* A blood-stained board with protruding nails—the suspected murder weapon—was approximately 20 feet from Dennis's body. Officers also recovered hair strands on a second piece of wood, later determined to match Dennis's hair, and a small blood-stained piece of metal consistent with the handle of a .22 caliber Colt Frontier Scout revolver. *Id.*

The county coroner determined that Dennis died from blunt-force trauma to the head, which had caused multiple skull fractures. *Id.* The coroner also found sperm in Dennis's vagina and underwear, which DNA experts later matched to Mason's DNA. App. 10a (noting that they did not find DNA from anyone other than Dennis and Mason).

A sheriff's deputy and a second witness had both seen Mason in the vicinity of the abandoned

building at the approximate time of Dennis's murder. App. 8a, 62a.

B. A jury convicted Mason and recommended a sentence of death, which the state trial court accepted.

Mason pleaded not guilty to charges of aggravated murder, with a death penalty specification; rape, with a prior aggravated felony specification; and having a weapon while under a disability. A firearm specification was added to each count. App. 10a. At trial, a jury convicted Mason of all three charges. App. 11a.

During the sentencing phase of Mason's trial, the defense offered the testimony of two deputy sheriffs about Mason's good behavior while incarcerated. *Id.* Mason's wife, mother, brother, sister, and cousin then asked the jury to show mercy and spare Mason's life. *Id.* Mason's wife also described Mason's artistic talent, and the jury examined his drawings. *Id.* Finally, Mason made an unsworn statement, in which he denied killing Dennis and asked the jury for a life sentence. *Id.* Although defense counsel had prepared 12 mitigation exhibits and a videotaped deposition of Dr. Joseph T. Spare, a psychiatrist who examined Mason, counsel decided not to introduce this evidence to avoid the State's rebuttal. The defense rested, and the State offered no rebuttal evidence. *Id.*

The trial judge instructed the jury on three possible sentences: death, life with parole eligibility after 30 years, and life with parole eligibility after 20 years. App. 11a-12a. After less than six hours of deliberations, the jurors said they were

"irreconcilably deadlocked on the three sentencing options." Sentencing Tr. 4368. After receiving an additional instruction, the jury continued deliberations for approximately three hours before recessing for the evening. *Id.* at 4373-74, 4376. The following morning, the jury reconvened and deliberated for five minutes before reporting a unanimous verdict recommending death.[1] *Id.* at 4379, 4382.

The trial court accepted the jury's recommendation and sentenced Mason to death. The court denied Mason's motion for a new trial. App. 12a.

C. The state courts affirmed Mason's conviction and sentence on direct review, and denied him post-conviction relief.

On direct review, both the intermediate state appeals court and the Ohio Supreme Court affirmed Mason's conviction and sentence. See App. 303a-304a. The Ohio Supreme Court specifically rejected Mason's claim that he received ineffective assistance of counsel at mitigation because trial counsel should have gathered and presented evidence about Mason's background. The court concluded that counsel's decision to stop investigating and not to introduce evidence of Mason's psychological and family history was reasonable because "Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal." App. 341a. The court also found that

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[1] Earlier votes had been 11-1 in favor of the death penalty. Mary Downs Aff. ¶ 8, July 11, 1994.

Mason had not satisfied the second prong of *Strickland* because he failed to show that counsel's performance caused actual prejudice.

While his direct appeal was pending, Mason filed a petition for state post-conviction relief. See App. 13a. The trial court denied relief, and the intermediate state appeals court affirmed. The Ohio Supreme Court dismissed the appeal as not involving a substantial constitutional question. *Id.*

D. The federal district court initially denied Mason habeas relief and again denied relief after conducting an evidentiary hearing on ineffective assistance at mitigation.

Mason filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. J.A. 28-206; see J.A. 207-377 (corrected habeas petition). The district court denied relief, App. 188a, but the Sixth Circuit reversed and remanded for an evidentiary hearing on Mason's claim of ineffective assistance at mitigation, App. 106a-107a.

On remand, the district court held a three-day evidentiary hearing. App. 60a-61a. Mason's habeas counsel called the following witnesses: Mason's trial counsel, Lawrence Winkfield and Ted Coulter,[2] App. 68a-78a; an attorney who testified about professional standards for capital representation in 1994, App. 78a; a clinical psychologist who testified about Mason's background and Dr. Spare's evaluation, App. 79a-80a; a psychologist who examined Mason

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[2] Winkfield was responsible for the guilt phase of Mason's trial, and Coulter took the lead on the mitigation phase. J.A. 1515.

during state post-conviction proceedings, App. 80a-81a; a mitigation specialist, App. 81a; and several of Mason's family members, App. 81a-82a. The State then introduced Danielle Miller Richardson's testimony that Mason raped her, as well as the testimony of Mason's prior girlfriend that she had told Mason's trial counsel that Mason had treated her violently in the 1980s. App. 82a-83a.

After reviewing the parties' post-hearing briefs, the district court again denied the writ, reasoning that, "[n]ot only did counsel perform a thorough investigation of [Mason's] background and social and family history, counsel's mitigation presentation strategy cannot be assailed." App. 96a. The court concluded that trial counsel's performance was not deficient at mitigation, and that any alleged prejudice was unclear. Finally, the court reviewed the Ohio Supreme Court's resolution of Mason's ineffective assistance claim and concluded that it was "not an unreasonable application of or clearly contrary to any United States Supreme Court precedent." App. 102a.

E. The Sixth Circuit concluded that Mason received ineffective assistance of counsel at sentencing, and granted habeas relief.

After reviewing the evidence from the district court's evidentiary hearing, the Sixth Circuit granted Mason habeas relief. App. 7a. The Sixth Circuit's analysis focused on what trial counsel knew when he selected a mitigation strategy, several days before the sentencing phase began. The court outlined Coulter's investigative efforts, then concluded that his "efforts to learn any further details about Mason's background were woefully inadequate" and

thus could not support his strategic mitigation decision. App. 33a-34a. The Sixth Circuit also concluded that trial counsel's inadequate investigation prejudiced Mason because, in light of the jury's initial deadlock at sentencing, there was a reasonable probability that "[e]ven a slightly more compelling case for mitigation . . . might have altered the outcome of the sentencing phase." App. 34a. After a perfunctory nod toward AEDPA, the Sixth Circuit concluded that the Ohio Supreme Court had unreasonably applied *Strickland* and was objectively unreasonable in finding no prejudice.

Chief Judge Boggs in dissent argued that Mason was not entitled to relief. He observed that the majority did "not point to a single significant piece of evidence in the record of which Coulter was unaware due to his failure to investigate further." App. 52a (emphasis omitted). Coulter therefore "possessed all of the essential facts regarding Mason's background necessary to make a reasonable strategic choice," App. 55a, and the Sixth Circuit did nothing more than second-guess that choice. The dissent saw "no reason to believe that *any* competent defense counsel," having conducted adequate mitigation investigation, would choose a mitigation strategy that risked opening the door to testimony about a rape that was "eerily similar" to the facts of Mason's case. App. 56a. Therefore, Chief Judge Boggs concluded that Mason was not prejudiced by any alleged deficiencies in counsel's mitigation performance.

Over the dissent of Chief Judge Boggs, the Sixth Circuit denied the State's request for rehearing or rehearing en banc. App. 3a-4a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's judgment for two reasons. First, this is just one of several recent Sixth Circuit decisions that set unreasonably high standards for trial counsel's mitigation performance, and one of those cases is currently pending on the merits before this Court. See *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak*, 2009 U.S. Lexis 1536 (Feb. 23, 2009); see also *Awkal v. Mitchell*, 559 F.3d 456 (6th Cir. 2009), petition for en banc review pending; *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir. 2008). This Court has long made clear that counsel's strategic decisions "are virtually unchallengeable" if made "after through investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S. at 690. But here the Sixth Circuit found that trial counsel's mitigation investigation was inadequate without identifying a single piece of significant evidence about which counsel was unaware. See App. 52a (Boggs, C.J., dissenting). The court nevertheless declined to defer to trial counsel's sound decision to adopt a mitigation strategy designed to avoid damaging rebuttal evidence, and thereby simultaneously rejected counsel's corresponding decision to limit his mitigation investigation accordingly.

Second, this case is yet another example of the Sixth Circuit's disregard for principles of comity and federalism in the habeas context. See, e.g., *Spisak*, 512 F.3d 852; *Awkal*, 559 F.3d 456. The Sixth Circuit has repeatedly ignored AEDPA's mandate that federal habeas courts afford great deference to

state court judgments. Here, the federal court afforded *no* deference to the state courts' objectively reasonable resolution of Mason's claim. This is particularly troubling because the state courts' evaluation of counsel's mitigation performance turned on its interpretation of *state* rules of evidence: The Ohio Supreme Court found that trial counsel's strategy was reasonable because counsel was justifiably concerned that introducing background evidence would open the door to highly damaging rebuttal. But the Sixth Circuit displaced the Ohio Supreme Court's judgment with a contrary interpretation of Ohio's evidentiary laws and concluded that trial counsel's mitigation strategy, and corresponding decision to limit his mitigation investigation, amounted to inadequate representation. Similarly, the federal court declined to defer to the state courts' reasonable finding that Mason was not prejudiced by any alleged deficiency in trial counsel's mitigation performance.

A. The Sixth Circuit improperly expanded the definition of "ineffective assistance of counsel at mitigation" by refusing to give deference to trial counsel's reasoned strategic decisions.

Mason's trial counsel faced a dilemma in selecting a mitigation strategy: If he introduced evidence of Mason's background, he would risk the introduction of rebuttal testimony that might seriously impair Mason's chances of receiving a life sentence. See J.A. 1600-01 (Coulter's description of the state's rebuttal evidence). The prosecution was prepared to introduce evidence that Mason raped and threatened to kill Danielle Miller four months

before raping and murdering Robin Dennis, as well as evidence of Mason's "past convictions, burglary and trafficking and drugs." J.A. 1601; see J.A. 1416-33 (transcript of Miller's interview with police). Counsel ultimately decided not to present evidence of Mason's background, and proceeded accordingly.

The Sixth Circuit found constitutional fault with trial counsel's choice not to risk the introducing of damaging rebuttal evidence. But the court came to this erroneous conclusion by improperly blending the standard for reviewing counsel's strategic decisions with the standard for reviewing the adequacy of a mitigation investigation. By doing so, the Sixth Circuit manufactured a new, higher standard for counsel's mitigation performance that is in conflict with *Strickland*'s deferential posture toward counsel's reasonable conduct.

Strickland set forth the familiar two-part test for evaluating ineffective assistance claims. To establish ineffective assistance of counsel, a defendant must: (1) show that counsel's performance "fell below an objective standard of reasonableness," as determined by "prevailing professional norms," 466 U.S. at 688; and (2) demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. When applying *Strickland*, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "[j]udicial scrutiny . . . must be highly deferential." *Id.* at 689. Counsel's strategic decisions "are virtually unchallengeable" if they are made "after thorough investigation of law and facts relevant to plausible options." *Id.* at 690; see

Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."). In accord with this presumption, courts must strive "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Under *Strickland* and its progeny, the mitigation performance of Mason's trial counsel is unassailable for two reasons. First, counsel's mitigation investigation was sufficient because Mason cannot identify any significant aspect of his background about which counsel was unaware before he selected a mitigation strategy. App. 52a (Boggs, C.J., dissenting). In fact, counsel had a very representative picture of Mason's background when he chose a mitigation strategy. Second, counsel's strategic decision—to forgo both additional investigation and the presentation of background evidence in mitigation—followed from carefully balancing the benefits of any possible mitigating evidence of Mason's background against the risk that such evidence would open the door to highly damaging rebuttal evidence. Counsel concluded that, whatever background evidence he might uncover through additional investigation, he would never introduce it because he did not want to risk rebuttal. The analysis motivating counsel's decision to limit his mitigation investigation was therefore identical to the analysis leading to counsel's selection of a mitigation strategy. Accordingly, even though the Sixth Circuit granted habeas relief in the name

of an inadequate mitigation investigation, the court actually reached that decision only by second-guessing trial counsel's reasonable strategic decisions after the fact.

1. Trial counsel had sufficient information to support his decision to abandon further background investigation.

When a habeas petitioner alleges that trial counsel's mitigation strategy was not supported by sufficient investigation, this Court "focus[es] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of background *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Here there is no doubt that counsel conducted a reasonable investigation before selecting a mitigation strategy. The record confirms that counsel was aware of each potentially significant aspect of Mason's family background before deciding to discontinue investigation.[3]

Trial counsel accumulated numerous documents relevant to Mason's background and spoke with many of Mason's family members. After conducting

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[3] The Sixth Circuit made much of Coulter's inability to remember exactly when he conducted specific interviews or other parts of his investigation. When Coulter testified at the evidentiary hearing, however, he was trying to recall the details of an investigation conducted ten years earlier. App. 50a (Boggs, C.J., dissenting). And Mason bears the burden of proving that counsel's investigation was ineffective; counsel does not bear the burden of proving the converse. *Id.* Furthermore, even if Coulter conducted additional investigation after selecting a mitigation strategy, that does not undermine the reasonableness of his strategy. Counsel often continues to investigate and to reassess strategy as a trial progresses.

multiple interviews with Mason, J.A. 1593-94, Coulter spoke to Mason's wife, J.A. 1586; mother, J.A. 1612; father, J.A. 1680; brother, J.A. 1654-55, 1680; sister, J.A. 1680; and aunt, J.A. 1656-57, 1661. He contacted Mason's probation officer, J.A. 1659-61; a social services employee who had supervised Mason as a child, J.A. 1586, 1589; and the corrections officers supervising Mason in jail, J.A. 1612. Coulter arranged for Mason to have a psychiatric assessment, J.A. 1170-1235, 2277-88; attempted to secure a mitigation specialist, J.A. 1621-26, 1360-63; and contacted the public defender's office to discuss strategy, J.A. 1599-1600. He reviewed thousands of pages of documentation about Mason. J.A. 1585; see App. 345a-388a (describing documents the prosecutor provided to Coulter). These documents included information about Mason's criminal history, parole, education, medical records, history with Children's Services, evidence of drug use by Mason's parents during his childhood, Mason's alleged abuse at his father's hands, Mason's history of running away, and Mason's history of drug use and trafficking at an early age. See *id.* Counsel also tracked down the State's most damaging potential rebuttal witness. J.A. 1654.

Although these sources provided some conflicting information about Mason's past, they clearly identified the aspects of Mason's background that were likely to yield potential mitigating evidence. For example, Dr. Spare's psychiatric report described Mason's childhood as follows:

> Mr. Mason reports that he became aware at an early age that his parents were involved in the "drug scene." He states

> that it was well known in the neighborhood that they were sellers of drugs and he found this embarrassing. In spite of this concern, he began himself to use marijuana in about the fifth grade.
>
> He apparently initially obtained marijuana from his parents' [sic] home and then began a pattern of stealing and running away which caused increasing problems.
>
> His parents apparently objected to his running away, skipping school, and stealing from them in order to obtain drugs or stealing their drugs, and he was the subject of frequent punishments.

J.A. 2277. Coulter's own notes also indicate that Mason was "[b]orn in a drug-related family, family deals in drugs and does now, drug programs. . . . both parents to prison for drugs." J.A. 1616. Coulter clearly knew Mason's history of drug abuse and trafficking, and that Mason's nuclear family had exposed him to drug use and trafficking at a very young age.

Coulter also knew Mason was "[r]aised in a home . . . with the tendency of his father to be abusive toward him." J.A. 2279; see also J.A. 2194 ("This young man comes from a family which has had many problems over the years . . . . He has been exposed to quite a lot of violence. . . ."). Mason had described his childhood habit of running away, explaining that his parents would generally find him in "one or two days. Later, beat the shit out of me. I mean tied me down with rope and did it to me, then put me in my room." Probation and Institutional

Report, Marion County C.P., No. 84-CR-20, at 2 (Apr. 18, 1984). On one occasion when Mason was 13 years old, Mason's father was arrested for assaulting him. J.A. 2185-91. Counsel also knew Mason may have been abused by his mother. J.A. 1672. Counsel may not have known the precise scope of violence or abuse in the Mason household, but he certainly knew further investigation of these areas would likely yield additional mitigating evidence.

The district court later conducted an evidentiary hearing on remand, hearing the evidence that Mason alleges his trial counsel should have discovered and presented at mitigation.

> The district court summarized this evidence as showing that Mason's father ran a prostitution ring for three years, that he operated a home-based drug business with ten employees selling drugs for him, that both of Mason's parents were daily drug users as well as traffickers, that Mason's mother shot his father because of his involvement with prostitution, and that Mason's parents regularly abused Mason and isolated all of their children from anyone not associated with the parents' drug dealing activities. Further, the evidence demonstrated that Mason had experimented with drugs as an eight-year old, that Mason's father took him along on trips to purchase and sell drugs while Mason was in the sixth and seventh grades, and that Mason had a borderline personality disorder largely as a result of his dysfunctional home environment.

App. 34a-35a (internal citations omitted). Based on this narrative, the only aspect of Mason's background that counsel may have not known to investigate at the time he chose a mitigation strategy was that Mason's father had been involved with prostitution. Counsel had some knowledge of each other area of Mason's history and would have continued investigating had he selected a mitigation strategy that included Mason's background.

When counsel makes a strategic decision after incomplete investigation, that decision is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. But, like all other strategic decisions, courts "apply[] a heavy measure of deference" to a decision not to investigate. *Id.*; see *Rompilla v. Beard*, 545 U.S. 374, 381 (2005). A reviewing court therefore must evaluate whether, under the circumstances "as seen 'from counsel's perspective at the time,'" a reasonable attorney would have investigated further. *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 689).

Here, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigation circumstances was supported by reasonable professional judgment." *Burger v. Kemp*, 483 U.S. 776, 794 (1987). Counsel knew enough about Mason's background to identify potential mitigation avenues, and "there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 795. Having decided not to present evidence of Mason's background at sentencing, counsel "reasonably

determined that he need not undertake further investigation to locate witnesses who would make statements about [the defendant's] past." *Id.* Counsel's termination of the investigation was thus a product of reasoned strategic judgment, not inattention. Cf. *Wiggins*, 539 U.S. at 526 (finding that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment" because counsel only decided against a mitigation defense at the last moment). "[C]ounsel has wide latitude in deciding how best to represent a client," *Yarborough*, 540 U.S. at 5-6, and Mason's counsel exercised that latitude here.

2. Trial counsel's mitigation strategy was objectively reasonable.

Trial counsel adopted an informed and reasonable mitigation strategy: He decided the benefits of introducing evidence of Mason's background were outweighed by the risk of the State's potential rebuttal evidence. J.A. 1736 (Coulter believed "the rebuttal [was] stronger than any mitigation" he would get out of Mason's background or Dr. Spare's testimony.). The Sixth Circuit afforded no deference to this reasoned judgment—let alone a strong presumption that the strategy was reasonable—and instead concluded that counsel's strategy was, by definition, ineffective because counsel had not conducted sufficient investigation before selecting it. App. 34a. But the Sixth Circuit's characterization of counsel's mitigation investigation is inaccurate, as explained above, and its reasoning is flawed. The question here is whether, in light of the investigation conducted, counsel's decision to reject a particular

mitigation strategy—and corresponding decision to forgo additional investigation—was reasonable and therefore is entitled to deference.

Strickland's strong presumption in favor of counsel's strategic judgments means that counsel can be constitutionally effective at mitigation even if they do not present certain mitigation evidence. In *Burger*, 483 U.S. 776, this Court held that counsel did not provide ineffective assistance by declining to introduce mitigation evidence of his client's "troubled family background" for two reasons: first, the evidence was "by no means uniformly helpful" to the defendant, *id.* at 793; and, second, "it was surely not unreasonable for [counsel] to have concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence," *id.* at 792. Even where this Court has found ineffective assistance at mitigation, it nevertheless has reiterated that *Strickland* does not "require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins*, 539 U.S. at 533; see *id.* at 525 (holding that counsel's decision was unreasonable because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

Moreover, the Court has specifically recognized that it can be a sound sentencing strategy to withhold potentially mitigating evidence in order to prevent the introduction of damaging rebuttal evidence. In *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court deferred to counsel's strategic decision not to present certain mitigating evidence

because it would have allowed the prosecution to introduce evidence of the defendant's criminal history, infidelity, and unfavorable psychiatric assessment. *Id.* at 186-87. Similarly, had counsel introduced evidence of the defendant's non-violent character, it would have "opened the door for the State to rebut with evidence of petitioner's prior convictions." *Id.* at 186. Had counsel "attempted to put on evidence that [the defendant] was a family man, they would have been faced with his admission at trial that, although still married, he was spending the weekend furlough with a girlfriend." *Id.* This Court recognized that counsel reasonably could have viewed the rebuttal evidence as particularly damaging to the defendant's interests and thus decided to avoid opening the door.

Other circuits have adhered to the strong presumption that counsel's mitigation strategy is reasonable when counsel adopts the strategy after carefully weighing the benefits of mitigating evidence against the risks of possible rebuttal evidence. See, e.g., *Edwards v. Ayers*, 542 F.3d 759, 775 (9th Cir. 2008) (no ineffective assistance for failing to present mental health evidence where the evidence was "highly aggravating in its own right and would open the door to even more damaging evidence"); *Smith v. Quarterman*, 471 F.3d 565, 572 (5th Cir. 2006) (no ineffective assistance where trial counsel decided not to present mitigating evidence for fear that it would open the door to a "wealth of bad information"); *St. Aubin v. Quarterman*, 470 F.3d 1096 (5th Cir. 2006) (decision not to introduce testimony of petitioner's mental-health history was strategic because it would have opened the door to testimony regarding the petitioner's violent history);

Brodit v. Cambra, 350 F.3d 985 (9th Cir. 2003) (decision not to introduce testimony in child-sex abuse case to prevent damaging rebuttal evidence was reasonable); *Williams v. Woodford*, 384 F.3d 567 (9th Cir. 2002) (decision not to present evidence was reasonable strategy because its introduction would have opened the door to damaging rebuttal evidence of gang activities).

Trial counsel made a reasoned decision to avoid presenting evidence of Mason's background because he feared it might open the door to highly damaging rebuttal evidence. In making this decision, counsel considered several relevant factors: his understanding of Ohio's laws of evidence, the trial judge's attitude toward rebuttal evidence, the prosecutor's rebuttal evidence, and the facts of Mason's background. Counsel was familiar with the Ohio Supreme Court's opinion in *Ohio v. DePew*, 528 N.E.2d 542 (Ohio 1988), which says that prosecutors "must be empowered to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false." *Id.* at 554. The trial judge already had said he would admit rebuttal evidence of Mason's criminal history if trial counsel presented Dr. Spare's testimony that Mason was unlikely to be a repeat violent offender, App. 38a; J.A. at 1602-1603 (citing *DePew*, 528 N.E.2d 542), and counsel believed the trial judge had a "hair trigger" approach to admitting rebuttal evidence in general. J.A. 1737.

Counsel was particularly concerned about opening the door to rebuttal here because he knew what the prosecution hoped to introduce: evidence of Mason's criminal history, including testimony that

he had raped and threatened Danielle Miller only months before Dennis was raped and murdered. J.A. 1600-01. Coulter was most concerned about Miller's evidence because "she was similar aged to the victim of this case," her rape occurred "three or four months before this alleged incident," and "there was a threat of force." J.A. 1711. Coulter worried "that the jury would see through her, possibly the pain, and it would be damaging to our plea for [Mason's] life." *Id.* Coulter felt Miller's testimony "was a substantial danger" to Mason, J.A. 1712, and he tracked down Miller to verify her intent to testify, J.A. 1650-51.

Coulter then discussed his mitigation dilemma with attorneys at the Ohio Public Defender's Office, J.A. 1721-22, and reviewed the mitigation proceedings from other capital cases in Marion County, J.A. 1714-16. According to Coulter, he and attorneys from the Public Defender's Office agreed "that it would probably not be best" to introduce background evidence in light of Miller's rebuttal evidence. J.A. 1721. With all these factors in mind, Mason's counsel selected a mitigation strategy: He decided not to introduce evidence of Mason's background in mitigation, and instead to present evidence of mercy, Mason's good conduct in jail, and residual doubt.

Counsel's decision was reasonable for all the reasons described above, even if there was only a reasonable *possibility* that presenting evidence of Mason's background would open the door to highly damaging rebuttal evidence. Coulter reasonably believed that the trial court would allow the State's rebuttal evidence. And attorneys are not obligated to risk an adverse evidentiary ruling at trial in hopes of

reversal on appeal, especially when a client's life is at stake. See App. 57a (Boggs, C.J., dissenting). Furthermore, counsel was surely aware that evidence of Mason's background could cut both ways, even without the State's rebuttal. Mason's background indisputably includes a long personal history of drug use, drug dealing, running away, and criminal activity. Any attempt to portray this history sympathetically would no doubt have been countered by the state's alternative portrayal of Mason's background. And, as Chief Judge Boggs noted in his dissent, "it is entirely possible that, had defense counsel pursued a mitigation strategy that relied on extensively describing Mason's character and background, one of the family members might accidentally have commented in some way on Mason's criminal history, which would have opened the door to the disastrous rebuttal evidence even under the [Sixth Circuit's] reading of *DePew*." *Id.*

If the Sixth Circuit's decision stands, it will raise the *Strickland* bar for counsel's mitigation performance to an unprecedented level. See App. 58a ("This opinion sets an almost impossibly high bar for defense counsel in capital cases.") (Boggs, C.J., dissenting). Counsel would have to devote significant time and resources to mitigation investigation even when they know they will not be able to use the fruits of the investigation. Here, counsel decided he should not introduce testimony about Mason's background because, if he did, the trial court would likely allow damaging rebuttal evidence. But the Sixth Circuit nevertheless found that counsel was obligated to continue investigating Mason's background. "Nothing in *Strickland* or its progeny requires defense counsel to go to such

extreme lengths in order to meet the (relatively low) threshold of 'reasonably effective assistance.'" App. 59a (Boggs, C.J., dissenting).

B. The Sixth Circuit violated AEDPA's mandate of deference to state courts by rejecting both the Ohio courts' reasonable resolution of Mason's claim and their interpretation of Ohio law.

The Sixth Circuit afforded no deference to the Ohio courts' resolution of Mason's ineffective assistance claim, instead conducting its own independent evaluation of how it thinks *Strickland* applies to these facts. There is no question that the Ohio courts properly identified the law of ineffective assistance and applied that law when evaluating Mason's claim. Even if the Ohio courts' ineffective assistance analysis was wrong—and it was not—the Sixth Circuit failed to show how that analysis was *unreasonable*.

AEDPA dictates that a federal court can grant habeas relief only if a state court's "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). A state court unreasonably applies clearly established federal law when it "identifies the correct governing legal principle from this Court's decisions, but unreasonably applies that principle to the facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 391. Thus, if a state court properly identifies *Strickland* as the analytical framework for

evaluating an ineffective assistance claim, a federal habeas court can only grant a writ upon concluding that the state court's application of *Strickland* was objectively unreasonable. *Id.* at 410-11; see *Bell v. Cone*, 535 U.S. 685, 699 (2002). A federal court cannot grant habeas relief simply because it "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Had the Sixth Circuit adhered to this standard of review, it would have been forced to recognize that the Ohio courts' resolution of Mason's claim was objectively reasonable and accordingly would have denied the writ.

1. The state courts' conclusion that Mason's trial counsel did not render ineffective performance was not objectively unreasonable.

The Sixth Circuit improperly refused to defer to the state courts' reasonable conclusion that trial counsel's mitigation performance was constitutionally adequate under *Strickland*. Instead, the Sixth Circuit dismissed the Ohio Supreme Court's interpretation of Ohio law, interpreted Ohio law itself, and independently evaluated trial counsel's mitigation strategy. The court then concluded that counsel rendered ineffective assistance under *Strickland*. The Sixth Circuit never established, however, that the Ohio courts' resolution of the same issue was objectively unreasonable.

On direct review, the Ohio Supreme Court agreed with trial counsel's analysis of the

admissibility of rebuttal evidence, and denied relief on Mason's claim of ineffective assistance at mitigation. The court reasoned that Mason could not have presented evidence about his character and rehabilitation potential without risking the State's introduction of negative rebuttal evidence:

> [Mason's] records also show prior involvements with the criminal and juvenile justice systems, and other unfavorable matters. Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal.
>
> Similarly it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation. We will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently.

App. 341a (internal citation omitted).

The Sixth Circuit reached a contrary conclusion, but it offered no persuasive reason why the state courts' ruling was objectively unreasonable. The Sixth Circuit ignored the Ohio Supreme Court's reasonable resolution of Mason's claim, and instead interpreted both *DePew* and the trial court's

evidentiary rulings about *DePew* narrowly. App. 36a-38a; see also *Bradshaw v. Richey*, 546 U.S. 74 (2005) (finding that the Sixth Circuit had disregarded the Ohio Supreme Court's interpretation of state law to overturn a conviction and death sentence). *DePew* held that a prosecutor's right to "rebut false or incomplete statements regarding the defendant's criminal record" at mitigation is "limited . . . to those instances where the defense offers a specific assertion, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history." 528 N.E.2d at syllabus ¶ 3. But that holding does not speak to a prosecutor's ability to rebut other mitigation evidence at sentencing. In fact, *DePew* recognized more broadly "that the prosecutor . . . must be empowered to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false." *Id.* at 554 (explaining that a prosecutor can rebut testimony that the defendant goes to a certain weekly mass with the presiding priest's testimony that the defendant never attends); see generally Ohio R. Evid. 404(A)(1); Weissenberger's Ohio Evidence Treatise § 404.5 (If a defendant introduces evidence of a particular character trait, the prosecution may offer rebuttal evidence attacking the defendant's character.).

Just one year after Mason's sentencing, the Ohio Supreme Court confirmed *DePew*'s general statement about a prosecutor's ability to introduce rebuttal evidence at sentencing: "[C]ounsel for the state at the penalty stage of a capital trial may introduce and comment upon . . . evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant."

Ohio v. Gumm, 653 N.E. 2d 253 at syllabus (Ohio 1995); see also *Ohio v. Lundgren*, 653 N.E.2d 304, 322 (Ohio 1995) ("Prosecutors may 'rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false'.") (quoting *DePew*, 528 N.E.2d at 554); *Ohio v. Raglin*, 699 N.E.2d 482, 490 (Ohio 1998) ("The prosecution was entitled to introduce relevant evidence rebutting the existence of any statutorily defined or other mitigating factor first asserted by the defense."). Trial counsel and the Ohio courts both reasonably concluded that, under Ohio law, a mitigation strategy including evidence of Mason's background would create a substantial risk that the trial court would admit highly damaging rebuttal evidence.

2. The state courts' conclusion that Mason did not suffer prejudice was not objectively unreasonable.

The Sixth Circuit also failed to defer to the state courts' objectively reasonable conclusion that Mason failed to establish prejudice. To prevail on an ineffective assistance claim, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of capital sentencing, a defendant can establish prejudice by showing a "reasonable probability that at least one juror would have struck a different balance" if counsel had performed effectively. *Wiggins*, 539 U.S. at 537. But Mason cannot meet this standard. And, more important, the Ohio courts reasonably concluded that Mason cannot meet this standard.

The Sixth Circuit found prejudice by reasoning that, because "Mason's jury initially reported a deadlock regarding his sentence . . . . [e]ven a slightly more compelling case for mitigation thus might have altered the outcome of the sentencing phase of Mason's trial." App. 34a. But this conclusion is wrong for three reasons: (1) the federal court refused to defer to the state courts' reasonable application of *Strickland*'s prejudice prong; (2) the federal court's analysis turned entirely on its conclusion that trial counsel's mitigation strategy (and corresponding decision to limit mitigation investigation) were unreasonable; and (3) the jury's initial deadlock at sentencing does not mean that the slightest additional evidence would have tipped the scales in favor of a life sentence.

First, the Sixth Circuit's prejudice analysis again reflects no deference to the state courts' reasonable resolution of Mason's ineffective assistance claim. On direct review, the Ohio Supreme Court concluded that Mason could not prevail on a claim of ineffective assistance at mitigation because he had failed to establish "a reasonable probability that different tactical choices at the penalty phase would have made a difference in the result." App. 341a (internal quotation and citation omitted). The central focus of counsel's strategy was avoiding damaging rebuttal evidence, in keeping with counsel's understanding of Ohio evidence law and the trial court's attitude toward rebuttal evidence. Thus, no matter how thoroughly counsel investigated Mason's background, he would never have introduced any evidence about it. The state court reasonably concluded that counsels' strategic decision was objectively reasonable and

that any alleged failing in counsel's mitigation investigation did not cause prejudice under *Strickland*.

Second, the Sixth Circuit's analysis turned on its willingness to supplant the state court's interpretation of state evidence law with its own. See *supra*, at pp. 28-29. The federal court apparently reasoned that trial counsel should have introduced background evidence because the trial court *might not* have admitted the prosecution's damaging rebuttal evidence: "Whether the trial court would have admitted the prosecutor's rebuttal evidence in response to a defense strategy based solely on the circumstances of Mason's troubled childhood remains a hypothetical question." App. 42a. But, as discussed above, counsel was not obligated to take that risk, and he acted reasonably by choosing a strategy calculated to avoid that risk. No matter how much additional mitigation investigation counsel conducted, he would not have presented additional background evidence to the jury. Thus, Mason cannot identify any prejudice resulting from counsel's alleged deficiencies.

Third, the fact that the jury initially deadlocked on Mason's sentence is not dispositive. The trial judge charged the jury on June 27, 1994, and the jurors deliberated for 75 minutes before recessing for the night. Sentencing Tr. at 4354. The jury resumed deliberations at 8:45 a.m. the next day. *Id.* at 4366. After a lunch break, the jury asked the court "what they should do if they are irreconcilably deadlocked on the three sentencing options." *Id.* at 4368. The court gave the jury additional instructions at 2:20 p.m., and the jurors deliberated for three hours that

afternoon. *Id.* at 4370-74, 4376. The following morning, the jury deliberated for five minutes before returning a verdict recommending that Mason be sentenced to death. *Id.* at 4379, 4382. At most, the jury deliberated three and one-half hours after announcing a deadlock. And even when the jury informed the trial judge of its initial deadlock—an 11-1 vote in favor of the death penalty—it did so in the form of requesting additional instructions.

3. The Sixth Circuit's erroneous ineffective assistance analysis here repeats the court's mistakes in *Spisak*, which is currently pending before the Court.

The deficiencies in the Sixth Circuit's *Strickland* analysis here are remarkably similar to those in *Spisak*, 512 F.3d 852, which is currently pending before this Court. In both *Spisak* and this case, the Ohio courts properly identified the law of ineffective assistance and applied that law when evaluating Mason's claim. But the Sixth Circuit did not defer to the Ohio Supreme Court's reasonable rejection of the petitioner's ineffective assistance claim in either case, instead conducting its own evaluation of how *Strickland* applied to the facts. And the Sixth Circuit did not, in either case, properly conclude that the state court's resolution of the Strickland claim was objectively unreasonable. This Court's decision in *Spisak*, then, will likely bear on the Sixth Circuit's deficient analysis here.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should hold this petition pending its decision in *Spisak*.

Respectfully submitted,

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July 17, 2009

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Supreme Court, U.S.
FILED
09-74 JUL 20 2009
OFFICE OF THE CLERK

No. 09-

In the Supreme Court of the United States

KEITH SMITH, WARDEN,

Petitioner,

v.

MAURICE MASON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. 1:99CV524

MAURICE MASON,

Petitioner,

v.

BETTY MITCHELL, WARDEN,

Respondent.

ORDER

KATZ, J

Dated: May 18, 2009

The Court held a telephone conference on May 15, 2009. This matter is before the Court on remand from the Sixth Circuit Court of Appeals. On October 7, 2008, the Sixth Circuit reversed the Court's opinion, remanded this matter to the Court, and ordered it to issue an conditional writ of habeas corpus vacating Petitioner, Maurice Mason's ("Mason") death sentence unless the state of Ohio commences a new penalty-phase trial against him within 180 days "from the date that the judgment in this matter becomes final." *Mason v. Mitchell*, 543 F.3d 766, 785 (6th Cir. 2008). The Sixth Circuit then issued its Mandate Order on February 27, 2009.

(Doc. No. 238.) Although the Respondent filed an untimely Motion to Stay or Recall the Mandate, the Sixth Circuit denied the Motion on May 6, 2009. (Doc. No. 241.)

In accordance with the Mandate Order from the Sixth Circuit, a conditional writ of habeas corpus is hereby granted as to Mason's sentence of death. The Respondent shall either: (1) set aside Mason's death sentence; or (2) conduct another mitigation hearing. This shall be done within 180 days from May 6, 2009, the date upon which the Court finds the judgment in this matter became final.

IT IS SO ORDERED.

s/ David A. Katz
U. S. DISTRICT JUDGE

Dated: May 18, 2009

APPENDIX B

No. 05-4511

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: February 19, 2009

MAURICE A. MASON,

Petitioner-Appellant,

v.

BETTY MITCHELL, WARDEN,

Respondent-Appellee.

Before: BOGGS, Chief Circuit Judge; MOORE and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

---

* Judge Cook recused herself from participating in this ruling.

submission and decision of the case. Accordingly, the petition is denied. Chief Judge Boggs would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
s/Leonard Green
Clerk

APPENDIX C

RECOMMENDED FOR
FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206
No. 05-4511

File Name: 08a0356p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAURICE A. MASON,
Petitioner-Appellant,

v.

BETTY MITCHELL,
Respondent-Appellee.

No. 05-4511

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 99-00524 – David A. Katz, District Judge.

Argued: November 28, 2007

Decided and Filed: October 3, 2008

Before: BOGGS, Chief Judge; MOORE and CLAY, Circuit Judges.

COUNSEL

ARGUED: David C. Stebbins, LAW OFFICES, Columbus, Ohio, for Appellant. Adam Michael Van Ho, OFFICE OF THE OHIO ATTORNEY GENERAL, Cleveland, Ohio, for Appellee.
ON BRIEF: David C. Stebbins, LAW OFFICES, Columbus, Ohio, Carol A. Wright, FEDERAL PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellant. Carol Ann Ellensohn, Matthew C. Hellman, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. BOGGS, C. J. (pp. 18-22), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. This case returns to us following the district court's denial of Petitioner-Appellant Maurice A. Mason's ("Mason") petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. In *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003) ("*Mason I*"), we remanded this case to the district court with instructions to hold an evidentiary hearing regarding Mason's claim that he received ineffective assistance of counsel at the sentencing phase due to his counsel's failure to conduct a reasonable investigation into his family background. After holding an evidentiary hearing on December 29 and 30, 2003, and January 6, 2004, the district court

issued a Memorandum Opinion and Order denying Mason's petition on October 31, 2005. *Mason v. Mitchell*, 396 F. Supp. 2d 837 (N.D. Ohio 2005) ("*Mason II*") (Joint Appendix ("J.A.") at 379-413). Although Mason's counsel reviewed records provided by the state that contained some references to violence and drug use in the Mason family home during Mason's childhood, Mason's counsel failed to investigate Mason's background and essentially conducted no interviews of any of Mason's family members prior to settling upon a plan for the sentencing phase that was limited to appeals for mercy and claims of residual doubt. We hold that trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the obvious red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age. Accordingly, we **REVERSE** the judgment of the district court, **GRANT** Mason a conditional writ of habeas corpus that will result in the vacation of his death sentence unless the state of Ohio commences a new penalty-phase trial against him within 180 days from the date that the judgment in this matter becomes final, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

In *Mason I*, we summarized the factual background of this case as follows:

> On February 8, 1993, Robin Dennis ("Robin"), the nineteen-year-old wife of Chris

Dennis ("Chris"), disappeared. Earlier that day, Robin and Chris had socialized with Mason and other friends, and Chris and Mason had discussed trading Chris's .22 caliber Colt Frontier Scout revolver for Mason's television. The next day, Robin was reported as missing to the Union County Sheriff's Department; the report stated that Mason was the last person seen with Robin.

On February 10, 1993, Deputy Sheriff Jack Lautenslager ("Lautenslager") received a report about an abandoned car in a rural area of Marion County. Two days earlier, Lautenslager had driven through that area and seen a black man walking, whom he later identified as Mason. Chevron-style shoe impressions, similar to those made by shoes that Mason and Robin owned, were found on the outside of the passenger door and on the passenger's side of the dash. Type-B blood, Robin's blood type, was found on the inside of the passenger door. A set of keys, including car keys that fit a 1981 Chrysler owned by Mason's wife, was on the car's front passenger seat.

A few hours after this discovery, Dennis Potts ("Potts") of the Marion County Sheriff's Department questioned Mason about Robin's disappearance. This interview took place at the detective's office of the Sheriff's Department and lasted for eighteen minutes. On February 12, 1993, following up on information from other interviews, Potts

questioned Mason again. The second interview took place in a basement interrogation room and lasted, with pauses in the questioning, for four hours. Mason appears to have understood that he was not under arrest at this time. After the second interview, Mason's parole officer took him into custody for a parole violation.

On February 13, 1993, Robin's body was found inside an abandoned building that was within eighteen minutes' walking distance from where her car had been found. She was lying face down, wearing only a bra; her jeans and underwear were pulled down to her ankles. Robin's T-shirt and car keys were under her jacket, which was found eight feet from her body with burrs and debris on it. The apparent murder weapon, a blood-stained board with protruding nails, was found twenty feet from her body. Another piece of wood found at the scene had strands of hair that matched Robin's hair. On February 15, 1993, detectives found a small blood-stained piece of metal at the crime scene, which a firearms examiner later concluded was identical to a grip-frame from a .22 caliber Colt Frontier Scout revolver and was consistent with having come from the handle of such a revolver

On February 14, 1993, pathologist Dr. Keith Norton ("Norton") conducted an autopsy and concluded that Robin had died as a result of blunt force trauma causing multiple skull fractures. Dr. Norton determined that the

> blood-stained board found at the scene and the butt of a revolver could have caused Robin's injuries. Dr. Norton also found sperm in Robin's vagina that DNA experts later matched to Mason's DNA. DNA material from Robin's underwear also matched Mason's DNA.
>
> The experts did not find DNA from anyone other than Robin and Mason.

Mason I, 320 F.3d at 611-12 (footnotes omitted).

B. Procedural History

Our prior decision and the district court's decision after our remand both recount the procedural history of this case, see *Mason I*, 320 F.3d at 612-13; *Mason II*, 396 F. Supp. 2d at 840-42, and we draw upon those decisions in our summary here.

In September 1993, Mason was charged with (1) aggravated murder, with a death penalty specification that the murder occurred during the commission of a rape; (2) rape, with a prior aggravated felony specification; and (3) having a weapon while under disability, with an offense of violence specification. In October 1993, after finding that Mason was indigent, the trial court appointed Lawrence A. Winkfield ("Winkfield") of Columbus, Ohio, as lead counsel and Ted I. Coulter of Marion, Ohio, as co-counsel in charge of the mitigation phase.

In December 1993, Mason was reindicted on the same charges, with a firearm specification added to each count, and Mason pleaded not guilty. Mason's jury trial began on May 31, 1994, and

concluded on June 18, 1994, when the jury found Mason guilty on all three counts.

On June 27, 1994, the trial entered the sentencing phase, and the court held a mitigation hearing in the presence of the jury. Mason's counsel presented the testimony of two deputy sheriffs from the Marion County Jail Division, who testified regarding Mason's good behavior during his time in incarceration pending trial. J.A. at 712-19 (Tr. at 4237-44). Mason's counsel presented brief testimony from Ruby Mason, Mason's mother, as well as his brother, sister, and cousin. The family members asked the jury to show mercy and to spare Mason's life. J.A. at 720-27 (Tr. at 4245-52). Terry Mason, Mason's wife, then testified, and she pleaded for mercy and displayed for the jury some drawings that Mason had made for her while incarcerated. J.A. at 727-30 (Tr. at 4252-55). On cross-examination, the prosecution questioned Terry Mason regarding her memory of events on the day of the murder. J.A. at 730-40 (Tr. at 4255-65).

Finally, Mason made an unsworn statement on his own behalf, in which he denied killing Robin Dennis and asked the jury to sentence him to one of the two life sentences so that he could have "the chance to take [his case] through the Appeals Courts." J.A. at 754-57 (Tr. at 4279-82). At that point, the defense rested and the prosecution did not offer any evidence in rebuttal.

The trial judge then instructed the jury regarding the three possible sentences that it could impose: (1) a sentence of death; (2) a sentence of life imprisonment with eligibility for parole after thirty

years; and (3) a sentence of life imprisonment with eligibility for parole after twenty years. See J.A. at 762 (Tr. at 4287). After approximately four and one-half hours of deliberation, the jury sent a question to the court, stating that "[w]e're unable to reach a unanimous decision on any one of the sentencing options." J.A. at 822 (Tr. at 4370); *State v. Mason*, 694 N.E.2d 932, 954-55 (Ohio 1998). The trial judge then gave the jury an additional instruction about further deliberations and asked whether there was a possibility that the jury might reach a verdict after an additional period of time. J.A. at 822-24 (Tr. at 4370-72). The foreman initially answered "No," but he agreed to discuss the possibility of continuing deliberations with the other jurors. *State v. Mason*, 694 N.E.2d at 955. Then, "[a]t 5:00 p.m., the jury sent a note that they had made 'some progress' and that it was 'best to adjourn for the evening & resume fresh in the AM.'" *Id.* After deliberating for approximately thirty minutes the next morning, June 29, 1994, the jury indicated that they had reached a unanimous verdict. *Id.* The jury's verdict was a recommendation that Mason receive a sentence of death.

On July 15, 1994, the trial judge accepted the jury's recommendation and sentenced Mason to death for aggravated murder. J.A. at 831-32 (Judgment at 1-2). "On August 9, 1994, the trial court heard argument on and then denied Mason's motion for a new trial." *Mason I*, 320 F.3d at 613.

Mason filed a timely appeal in which he raised twenty-four issues, and the Ohio Court of Appeals for the Third Appellate District affirmed his conviction

and sentence. J.A. at 833-55; *State v. Mason*, 1996 WL 715840, No. 9-94-45 (Ohio Ct. App. Dec. 9, 1996). Mason then appealed to the Ohio Supreme Court, which also affirmed Mason's conviction and death sentence. J.A. at 862- 876; *State v. Mason*, 694 N.E.2d 932 (Ohio 1998). The Supreme Court of the United States denied Mason's petition for a writ of certiorari on December 14, 1998. *Mason v. Ohio*, 525 U.S. 1057 (1998).

C. Procedural History—Post-Conviction

In *Mason I*, we summarized the course of Mason's state collateral attack on his conviction and sentence as follows:

> While his direct appeal was pending, Mason filed a state collateral attack in the Court of Common Pleas of Marion County, asserting seven assignments of error. *State v. Mason*, 1997 WL 317431, at *1 (Ohio Ct. App. June 6, 1997). On November 21, 1996, the court denied relief without holding an evidentiary hearing. *Id.* Mason appealed the dismissal of his post-conviction petition to the Court of Appeals for the Third Appellate District, which affirmed the judgment of the Court of Common Pleas on June 6, 1997. *Id.* at *7. Mason then filed a timely appeal to the Ohio Supreme Court, which dismissed the appeal on October 15, 1997, as not involving any substantial constitutional question.
>
> On July 15, 1999, Mason filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising twenty-five challenges

> to his conviction and sentence. On May 9, 2000, the district court denied Mason's habeas petition and his motion for an evidentiary hearing on various claims. *Mason v. Mitchell*, 95 F.Supp.2d 744, 795 (N.D. Ohio 2000). The district court subsequently granted a certificate of appealability as to all claims.

Mason I, 320 F.3d at 613.

Our decision in *Mason I* remanded Mason's claim of ineffective assistance at the sentencing phase to the district court for an evidentiary hearing but otherwise affirmed the district court's denial of Mason's petition.

D. The District Court's Evidentiary Hearing on Remand

The district court held an evidentiary hearing on December 29 and 30, 2003, and on January 6, 2004. The district court issued a Memorandum Opinion and Order denying Mason's petition on October 31, 2005. *Mason II*, 396 F. Supp. 2d 837 (N.D. Ohio 2005). The district court provided a thorough summary of the evidence and testimony presented at the hearing. *Mason II*, 396 F. Supp. 2d at 842-49, and we will discuss the evidence developed at that hearing as relevant to our analysis below.

II. ANALYSIS

A. Standard of Review

We review de novo a district court's determinations regarding a habeas petitioner's claim of ineffective assistance of counsel. *Higgins v. Renico*, 470 F.3d 624, 630 (6th Cir. 2006). We review

any factual findings made by the district court for clear error. *Moss v. Hofbauer*, 286 F.3d 851, 858 (6th Cir.), *cert. denied*, 537 U.S. 1092 (2002).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), governs our review of a state court's determination of Mason's claim because he filed his petition for a writ of habeas corpus after AEDPA's effective date. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). AEDPA provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a

conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Terry Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court's decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[C]learly established law under [AEDPA] encompasses more than just bright-line rules laid down by the [Supreme] Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." *Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir.), *cert. denied*, 537 U.S. 1007 (2002). "The lack of an explicit statement" of a rule "is not determinative" because "[t]he Court has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent." *Id.* at 852; see also *Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'") (quotation omitted).

B. Clearly Established Federal Law Regarding Ineffective Assistance of Counsel at the Sentencing Stage

The Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), provides "the legal principles that govern claims of ineffective assistance of counsel." *Wiggins v. Smith*, 539 U.S. 510, 521

(2003). Claims of ineffective assistance of counsel have "two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Id.* The Supreme Court assesses performance using an "objective standard of reasonableness" and "prevailing professional norms." *Strickland*, 466 U.S. at 688.

In this case, as in *Strickland*, *Williams*, *Wiggins*, and *Rompilla v. Beard*, 545 U.S. 374 (2005), Mason's "claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence" to be presented at the sentencing phase of a capital trial. *Wiggins*, 539 U.S. at 521; *Rompilla*, 545 U.S. at 380-81. In *Williams v. Taylor*, the Supreme Court "concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'" *Wiggins*, 539 U.S. at 522 (quoting *Williams*, 529 U.S. at 396) (alteration in original).

The Supreme Court has also emphasized that in analyzing a claim that counsel provided ineffective assistance by failing to investigate mitigating evidence, the "principal concern . . . is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." *Wiggins*, 539 U.S. at 522-23. Likewise, the Supreme Court has instructed that "[i]n assessing the reasonableness of an attorney's

investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also *whether the known evidence would lead a reasonable attorney to investigate further*." *Wiggins*, 539 U.S. at 527 (emphasis added). Therefore, even if counsel "limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* Finally, in assessing the reasonableness of counsel's investigation, the Supreme Court has cautioned that courts must avoid "hindsight" and that our analysis should "include[] a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* at 523 (quoting *Strickland*, 466 U.S. at 689).

As to showing the second *Strickland* prong of prejudice in the sentencing context, the Supreme Court has explained that a petitioner may demonstrate prejudice by establishing that "there is a reasonable possibility that at least one juror would have struck a different balance" had Mason's counsel uncovered and presented additional evidence of Mason's background. *Wiggins*, 539 U.S. at 537; *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996) ("[A] solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors."). The Supreme Court has specifically observed that "the graphic description of [a defendant's] childhood, filled with abuse and

privation, . . . might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398.

C. Mason's Claims of Ineffective Assistance of Counsel

Mason attacks the performance of his counsel in several related ways, but the crux of his challenge is that his counsel provided ineffective assistance because they failed to investigate his background and conduct any in-depth interviews of his family members prior to the decision on June 22, 1994, to limit the mitigation presentation to appeals for mercy and claims of residual doubt. Mason further contends that counsel's deficient performance prejudiced him because subsequent investigation has revealed significant additional information about Mason's childhood that might have humanized him to the jury—which had initially deadlocked regarding his sentence—and persuaded at least a single juror that the death penalty was not an appropriate sentence. Finally, we must consider whether the Ohio Supreme Court unreasonably applied clearly established federal law in adjudicating Mason's claim of ineffective assistance of counsel.

We agree with Mason on all three issues, and we analyze each in turn in the following sections.

1. Whether the Performance of Mason's Counsel Was Deficient

In light of the Supreme Court's decisions regarding what constitutes a reasonable investigation of mitigating evidence at the

sentencing stage—and of the circumstances that trigger counsel's obligation to investigate further—it is clear that the performance of Mason's counsel was deficient and objectively unreasonable. The testimony presented at the evidentiary hearing established that Coulter, who was responsible for handling the mitigation phase of Mason's trial,[1] selected his strategy for the mitigation hearing during the course of a 75-minute telephone call with members of the Ohio Public Defender's Office on June 22, 1994, just days prior to the mitigation hearing itself, which took place on June 27, 1994.[2] J.A. at 1599-1604; J.A. at 1629; J.A. at 1721-22; Resp. Br. at 56. Therefore, the evaluation of Coulter's performance must focus on what knowledge

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[1] Mason's other counsel was Winkfield, who primarily handled the guilt phase of Mason's trial and testified at the evidentiary hearing that he never interviewed any member of Mason's family regarding Mason's childhood or background, nor did he interview any of Mason's teachers, children's service workers, or his parole officer. J.A. at 1518-22. Mason's family members confirmed that Winkfield never discussed Mason's background or childhood with them. *See* J.A. at 1930 (Mason's father Michael Mason, Sr.); J.A. at 1050-51 (Mason's mother Ruby Mason); J.A. at 1970-71 (Mason's brother James Mason Jr.); J.A. at 1999-2000 (Mason's sister Mioshi); J.A. at 2004-06 (Mason's sister Michelle Floyd); J.A. at 1958-59 (Mason's cousin Minnie Range). In addition, Winkfield testified that he did not even review the box of state records concerning Mason that the prosecution disclosed in discovery. J.A. at 1521. Finally, Winkfield also testified that he was no longer licensed to practice law, having been suspended from the practice of law by the Ohio Supreme Court in 2001 for reasons unrelated to Mason's case. J.A. at 1522-23, 1541-42.

[2] Winkfield testified that he did not participate in the call with the Public Defender's office. J.A. at 1522.

Coulter then possessed regarding Mason's childhood and background and what investigation and interviews, if any, that Coulter had performed prior to making that decision. See *Wiggins*, 539 U.S. at 527 ("Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.").

Before analyzing Coulter's investigative activities prior to June 22, we first outline the minimum standards that the Supreme Court has established for such investigations. The Supreme Court has described "the standards for capital defense work articulated by the American Bar Association (ABA)" as "standards to which we long have referred as 'guides to determining what is reasonable.'" *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688). The edition of those standards current at the time of Mason's trial "provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " *Id.* (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (2d ed. 1989)).

The Supreme Court's opinions in *Wiggins* and *Rompilla* offer particularly instructive examples of how to analyze an attorney's investigation into mitigating evidence. In *Wiggins*, the Supreme Court noted that Wiggins's counsel reviewed state-provided records that revealed his mother's chronic

alcoholism, his history of shuttling among foster homes, his frequent and lengthy absences from school, and an instance in which his mother abandoned him and his siblings for days without food. *Wiggins*, 539 U.S. at 525. However, the Supreme Court held that Wiggins's "[c]ounsel's decision not to expand their investigation beyond the [state] records fell short of the professional standards that prevailed in Maryland in 1989" because "any reasonably competent attorney would have realized that pursuing these leads [revealed in the state records] was necessary to making an informed choice among possible defenses." *Id.* at 524-25. Observing that "the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background—the information in the [state] records—they were in a position to make a tactical choice not to present a mitigation defense," the Court characterized the state court's application of *Strickland* as "objectively unreasonable" because "the [state] court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the [state] records actually demonstrated reasonable professional judgment." *Id.* at 527. The Court concluded that "[i]n light of what the [state] records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. In discussing the nature of the evidence that later investigation uncovered about Wiggins's bleak childhood, the Court noted that a social worker had prepared "an elaborate social history report . . .

containing evidence of the severe physical and sexual abuse [Wiggins] suffered" and that the social worker had relied on state records *"as well as interviews with petitioner and numerous family members."* *Id.* at 516 (emphasis added). Finally, the Court approvingly discussed the federal district court's conclusion that awareness of some aspects of Wiggins's background "did not excuse [his counsel] from their duty to make a 'fully informed and deliberate decision' about whether to present a mitigation case" and that, "[i]n fact . . . *their knowledge triggered an obligation to look further.*" *Id.* at 519 (quoting *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 559 (D. Md. 2001)) (emphasis added).

The Supreme Court's decision in Rompilla offers a similar example regarding the obligation of counsel to conduct an investigation into *"all reasonably available* mitigating evidence" that includes efforts to gain information from *both* state records *and* family members. *Id.* at 524 (quotation omitted). In *Rompilla*, the Court noted that Rompilla's counsel did *some* investigation, which "includ[ed] interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase." *Rompilla*, 545 U.S. at 381. The Court even observed that "Rompilla's own contributions to any mitigation case were minimal," that Rompilla at times seemed to "send[] counsel off on false leads," and that "counsel spoke to the relatives in a 'detailed manner,' attempting to unearth mitigating information." *Id.* (quotation omitted).

Although Rompilla's counsel certainly conducted some investigation into his background, the Court held that Rompilla's counsel were deficient because they failed to consult available public records relating to Rompilla's prior convictions. *Id.* at 382-90. In particular, the Court faulted Rompilla's counsel for failing to review records relating to a conviction for rape and assault given the prosecutor's announced plan to use that conviction as a central part of the state's attempt to prove an aggravating factor. *Id.* at 383-84, 388-89. The Court reasoned that "[i]t flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking." *Id.* at 389. The Court further stated that "[i]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up," *id.* at 390, and the Court concluded that "[f]urther effort [to research those leads] would presumably have unearthed much of the material postconviction counsel found, *including testimony from several members of Rompilla's family, whom trial counsel did not interview*," *id.* at 391 (emphasis added).

We now turn to assessing Coulter's investigation prior to June 22 of Mason's childhood and background. In our previous opinion remanding this case to the district court for an evidentiary hearing, we stated that "[w]e find inexplicable the *apparent* failure of trial counsel to investigate mitigating evidence in this case." *Mason I*, 320 F.3d

at 623 n.13 (emphasis added). We also observed that "trial counsel's preparation for sentencing *appears* to have been limited to reviewing the documents that the prosecution disclosed to them and deposing Dr. Spare, who tried 'to determine mitigation' and 'to attempt to determine the likelihood of [Mason] being a repeat violent offender and/or his potential for rehabilitation.'" *Id.* at 626 (emphasis added) (quotation omitted); *see also id. at* 623 (stating that "trial counsel does not *appear* to have made any independent effort to investigate the particulars of Mason's history, character, or background") (emphasis added). Finally, we stated that "[t]he *alleged* failure of defense counsel to prepare Mason's family members for their testimony at sentencing further demonstrates that counsel conducted an inadequate investigation of mitigating evidence." *Id.* at 623-24 (emphasis added).

The evidentiary hearing confirmed what previously was only "apparent" or "alleged": that Coulter relied almost exclusively on the records provided by the state and inexplicably failed to conduct his own independent investigation and interview members of Mason's family regarding the circumstances of his childhood and background. Coulter confirmed that he *never* conducted any indepth interviews with *any* of Mason's relatives. J.A. at 1674-77; J.A. at 1728 ("There was no extensive interviews."). Although Coulter did contact some of Mason's family members, *see* J.A. at 1680 (stating he talked to various relatives "very briefly"), the crucial point is that the evidentiary hearing demonstrated that Coulter's "very brief[]" contacts with certain Mason family members

occurred *after* June 22, the point at which Coulter decided not to include any information about Mason's background or childhood in the mitigation presentation.

Coulter kept detailed, hand-written notes of the time that he spent working on Mason's case, *see* J.A. at 1298-1342, and Coulter's extensive testimony at the evidentiary hearing demonstrates that prior to selecting his mitigation strategy on June 22 Coulter did *not* interview members of Mason's family. According to Coulter's records and his testimony, his limited investigation essentially consisted of the following activities, discussed in chronological order from Coulter's appointment on October 28, 1993. J.A. at 1266.

First, from October 1993 until early May 1994, Coulter's records and his testimony demonstrate that he primarily devoted his time to seeking (and failing to obtain) mitigation assistance from the Ohio Public Defender's Officer and seeking (and failing to obtain) funding from the trial court to hire an independent mitigation investigator. J.A. at 1549-1575 (testimony interpreting time records from October 1993 to May 5, 1994); J.A. at 1298-1307 (time sheets for this period); Pet. Br. at 27-30.

Second, in May to June 1994, Coulter spent time on efforts to obtain a brief psychiatric examination of Mason. In early May, Coulter filed a motion seeking funds to pay for the services of Dr. Joseph T. Spare ("Dr. Spare"), a local psychiatrist. J.A. at 1576-77. On May 9, the trial court approved this request but limited the cost to $600, and Coulter's notes from the hearing on the motion

stated that the purpose of the examination was "to find out whether [Mason] is a serial killer or someone not to re-offend and kill again." J.A. at 1368-69; J.A. at 1577-79 (testimony regarding notes). After Dr. Spare examined Mason, he prepared a five-page psychiatric report. *Mason I*, 320 F.3d at 620-22. Dr. Spare based his examination and report solely on interviewing Mason himself and limited his evaluation solely to determining Mason's potential for rehabilitation and the likelihood of future dangerousness; Dr. Spare did not cover Mason's background or childhood in any great detail. J.A. at 1637. Coulter testified that the purpose of Dr. Spare's examination of Mason was "to see whether [Mason] had any severe mental defects, whether he was a repeated serial killer," that "[i]t was not for [Dr. Spare] to go out and interview a bunch of witnesses," and that Dr. Spare "wasn't to review a bunch of records in that regard." J.A. at 1637.[3] Coulter's preparation for the deposition included two hours on May 19 dedicated to reviewing and copying

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[3] Why Coulter decided to focus Dr. Spare's investigation on the chances of Mason being a repeat offender is somewhat puzzling, given that, according to an expert who testified at the evidentiary hearing, "[u]nder Ohio law in 1993, 1994 and still today, Ohio has no aggravating circumstance of future dangerousness. I guess by—the flip side of that be that it is certainly not a statutory mitigating factor." J.A. at 1774-75; *Mason II*, 396 F. Supp. 2d at 847 (summarizing this testimony). That Coulter channeled one of his few actual investigatory activities toward an attempt to establish the irrelevant—and, indeed, potentially rebuttal-enabling—proposition that Mason was unlikely to be a repeat offender only further illustrates the deficient nature of Coulter's performance.

certain state records to give to Dr. Spare, J.A. at 1318, as well as 1.75 hours devoted to preparing for and conducting the deposition on June 7. J.A. at 1595, 1329. June 7 was during the guilt phase of Mason's trial, and the deposition took place after trial had ended for the day. J.A. at 1329 (time sheet for June 7 reflecting six hours spent in court at trial).

After the conference with the Ohio Public Defender's Office on June 22, Mason's counsel ultimately decided to forego presenting Dr. Spare's deposition testimony because of fears that doing so would open the door to damaging rebuttal evidence that the prosecutor intended to present relating to Mason's history of violent conduct, allegedly including rape, brandishing a gun, resisting arrest, and burglary. *Mason I*, 320 F.3d at 624-25. We will analyze this issue in greater detail below, in our discussion of prejudice.

Third, Coulter spent five hours on May 15, 1994, reviewing the voluminous records pertaining to Mason that the state provided. J.A. at 1581-86, 1315. These records included documents pertaining to Mason's criminal history, his involvement with Children's Services, drug treatment programs, and some education records. J.A. at 1585. The district court summarized Coulter's testimony as showing that "[f]rom viewing these documents, Coulter learned that [Mason] was born into a drug-dependent family, that the family had in the past and currently was dealing drugs, and that both parents previously had been incarcerated for drug trafficking." *Mason II*, 396 F. Supp. 2d at 844. The records included a psychological evaluation

performed when Mason was thirteen years old that stated Mason "has been exposed to quite a lot of violence" and that he "comes from a family which has had many problems over the years." J.A. at 2193-94. The report stated that Mason had several injuries—including a large swelling near his left eye, cuts around his nose, and scars on his back and arms—that Mason claimed resulted from being beaten by his father. *Id.*

Fourth and finally, throughout the period from October 1993 to June 1994, Coulter met at the jail with Mason and Mason's wife several times. Although some of these visits lasted several hours, Coulter testified that generally their discussions were "not extensively[] about the mitigation part of the case." J.A. at 1593. Nonetheless, Coulter testified that he had become aware of many basic facts regarding Mason's background and childhood. At the evidentiary hearing, Coulter referred to notes he had taken pertaining to "some personal recollections" of Mason, such as that he "said when his dad went to prison [] his mom whipped him and his brothers were tied. His father tied him up too and whipped him . . . His dad would beat his mom and stabbed." J.A. at 1672.

Almost entirely absent from Coulter's activities is any mention of interviewing potential witnesses, *particularly family members*, regarding mitigation evidence. The only interviews known to have been conducted with any person other than Mason himself prior to the strategic decision on June 22 appear to be the following: (1) a .1 hour or six-minute call to Mike Ring from Children's Services on

May 17, and a .3 hour or eighteen-minute conversation with Mike Ring on May 24, J.A. at 1586, 1589, 1316, 1321; (2) a .6 hour or thirty-six-minute meeting on May 18 with Lowell Titus, who was a probation officer for Mason and his father, J.A. at 1559-60, 1317; Resp. Br. at 38, and who told Coulter that he knew Mason grew up in a "drug environment," J.A. at 1659.

Coulter's records and testimony did demonstrate that he talked very briefly to some, but not all, of Mason's family members, but the only conversations with family members for which Coulter's notes establish a known date took place *after* June 22. Thus, what little information Coulter learned from these brief conversations also could not have supported his strategic decision to pursue a mitigation strategy limited to residual doubt and appeals for mercy. Coulter testified that his notes showed that on June 26, the day before the mitigation hearing, he spent .3 hours, or eighteen minutes, talking on the telephone to Michelle Floyd, Mason's sister, Ruby Mason, Mason's mother, and two jailers who testified at the mitigation hearing that Mason had not caused any trouble while he had been incarcerated. J.A. at 1612, 1334.

Evidence presented at the hearing also indicated that Coulter *never* contacted several of Mason's siblings and other close relatives. Mason's sister Mioshi Mason testified that she was not interviewed by Mason's attorneys, but that she would have been willing to testify about conditions in the Mason home, J.A. at 1999-2000, and Coulter confirmed that he had not conducted an in-depth

interview with her, or with Mason's sister Nyota Mason, or with Mason's brothers Alex and Dimitri Mason. J.A. at 1674.

Coulter also testified at the evidentiary hearing about two pages of notes taken during his brief interviews with Mason's father, James Mason, Sr., and Mason's brother, James Mason, Jr., but Coulter could not recall when those interviews took place nor did he identify an entry on his time sheets corresponding to these interviews. J.A. at 1450 (notes of conversation with James Mason, Jr.), J.A. at 1686-89 (testimony regarding conversation with James Mason, Jr.), J.A. at 1654-55 ("I can't recall exactly" when the interview with James Mason, Jr., occurred); J.A. at 1451 (four lines of notes from conversation with James Mason, Sr.); J.A. at 1683-85 (testimony regarding conversation with James Mason, Sr.), J.A. at 1656 (stating that Coulter had "no independent recollection" of the conversation with James Mason, Sr., or when it occurred). Coulter recalled that James Mason, Jr., worked as a guard at the Marion Correctional Institution, that James told him there "was no abuse" in the household although there "was spanking" and that there were drug problems in the Mason home. J.A. at 1687-88. Coulter testified that his notes of his conversation with James Mason, Sr., Mason's father, indicated that James Mason, Sr., was never found guilty of the alleged assault against Mason described in the August 1977 police report, and that Mason's father "[s]ays never abused kid, did whip them." J.A. 1683-84.

Even if these interviews took place prior to June 22, they would not have rendered Coulter's investigation into Mason's background reasonable. Indeed, what Coulter appears to have learned from these interviews simply underscores the inadequacy of his investigation. Mason's brother confirmed to Coulter that there was a "[d]rug problem at home," J.A. at 1688, but Coulter's notes reflect that both James Mason, Jr., and James Mason, Sr., told Coulter that there "was no abuse" in the home, although admitting that some degree of physical discipline was used, including "spanking" and "whipping." Those statements appear to contradict the ample documentary evidence referred to above, such as the 1977 childhood psychological evaluation stating that Mason "has been exposed to quite a lot of violence" and that he "comes from a family which has had many problems over the years." J.A. at 2193-94. Likewise, the district court noted that the documentary evidence available to Coulter showed that Mason was "born into a drug-dependent family, that the family had in the past and currently was dealing drugs, and that both parents previously had been incarcerated for drug trafficking." *Mason II*, 396 F. Supp. 2d at 844.

Coulter's failure to continue his investigation and interview Mason's mother and remaining siblings about any abuse and drug activities is inexcusable given this apparent contrast between the facts contained in the documentary evidence and what he apparently learned from Mason's father and brother. The documents available to Coulter indicated that drugs and violence were a large part of Mason's childhood, but his interview notes reflect

that Mason's father and brother denied abuse, although they acknowledged physical discipline such as spanking and whipping. Coulter never followed up and never conducted further interviews with other family members to determine which account was accurate, and that failure was deficient performance. *See Wiggins*, 539 U.S. at 519 (stating that some knowledge may "trigger[] an obligation to look further").

Finally, Coulter's interviews with Mason's father and brother were both brief. J.A. at 1728 (stating that "[t]here was no extensive interviews" with any of Mason's family members); J.A. at 1656 (four lines of notes and "no independent recollection" of interview with James Mason, Sr.). *If* those interviews occurred before June 22, Coulter apparently concluded that their cursory accounts of life in the Mason home and Mason's childhood, which were at odds with the documentary evidence, provided him with a sufficient understanding of Mason's background to make a reasonable decision regarding mitigation strategy. In particular, he apparently concluded that those extremely brief interviews supported forgoing further investigation and the possible presentation of a mitigation defense based on pervasive violence and drug abuse in Mason's home.

In sum, the evidentiary hearing demonstrated that, although state records contained information suggesting that Mason's childhood was marked by violence and pervasive drug use, Coulter's investigative efforts to learn any further details about Mason's background were woefully

inadequate. His efforts consisted of no more than reviewing documents provided by the state, arranging for a psychiatric evaluation limited to predicting Mason's future dangerousness, talking to Mason himself, and very briefly talking to a small subset of Mason's family members. Under the Supreme Court's governing case law regarding counsel's obligation to undertake a reasonable investigation to support strategic decisions about the presentation of mitigation evidence, we have no doubt that the performance of Mason's counsel was deficient.

2. Whether the Deficient Performance of Mason's Counsel Caused Prejudice

To prevail on his claim of ineffective assistance of counsel, Mason must also show that his counsel's deficient performance caused him prejudice. We agree with Mason that his counsel's deficient performance caused him prejudice.

As described above, Mason need only have persuaded one juror not to impose the death penalty, and Mason's jury initially reported a deadlock regarding his sentence. Even a slightly more compelling case for mitigation thus might have altered the outcome of the sentencing phase of Mason's trial. At the evidentiary hearing, Mason presented substantial evidence detailing the abusive and unhealthy conditions of his childhood. The district court summarized this evidence as showing that Mason's father ran a prostitution ring for three years, that he operated a home-based drug business with ten employees selling drugs for him, that both of Mason's parents were daily drug users as well as

traffickers, that Mason's mother shot his father because of his involvement with prostitution, and that Mason's parents regularly abused Mason and isolated all of their children from anyone not associated with the parents' drug dealing activities. *Mason II*, 396 F. Supp. 2d at 847-49. Further, the evidence demonstrated that Mason had experimented with drugs as an eight-year-old, that Mason's father took him along on trips to purchase and sell drugs while Mason was in the sixth and seventh grades, and that Mason had a borderline personality disorder largely as a result of his dysfunctional home environment. *Id.* at 847-49. Mason thus "has the kind of troubled history that [the Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability," and we therefore hold that "had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Wiggins*, 539 U.S. at 534, 536.

The district court reached a contrary conclusion because it reasoned that any effort by Mason's counsel to introduce evidence about his childhood and background would necessarily have led to the trial court's admission of damaging rebuttal evidence about an alleged rape that Mason had committed. *See Mason II*, 396 F. Supp. 2d at 855. The district court stated, without citation to the record, that "the trial court specifically held that even if counsel presented only the mitigating evidence pertaining to [Mason's] family and social history, [Ohio evidence law] would allow the prosecution to present its rebuttal evidence." *Id.*

The district court therefore concluded that Mason could not establish prejudice because although "depicting his family background undoubtedly would have evoked sympathy from the jury, the prosecution's rebuttal evidence . . . could have turned the jury against him." *Id.*

Both the record and our holding in *Mason I* contradict the district court's understanding regarding the possible admission of the prosecution's rebuttal evidence. The district court provided no citation for its claim that the trial court ruled that the prosecution could present rebuttal evidence pertaining to Mason's criminal history even if Mason's mitigation presentation involved only his family history, and this view is simply wrong.

As we stated in *Mason I*, testimony that purely concerned Mason's troubled childhood would "not give the prosecutor the same opportunity for rebuttal that evidence about good character or rehabilitation potential could have." *Mason I*, 320 F.3d at 622 n.10. Indeed, in *State v. DePew*, 528 N.E.2d 542, 555 (Ohio 1988), the Ohio Supreme Court held that if "a mitigation witness called by the defense *falsely or incompletely testifies on the extent of the defendant's criminal record*, the prosecutor should be permitted to rebut." (emphasis added). The Ohio Supreme Court emphasized in *DePew* that "[t]his right is limited, however, to those instances where the defense offers a *specific assertion, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history.*" *Id.* (emphasis added); *see also id.* at 545 (identical

language in Syllabus ¶ 3)[4]; *see also Mason I*, 320 F.3d at 626-27 (quoting nearly identical language from *State v. Henness*, 679 N.E.2d 686, 698 (1997)).[5]

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[4] In the Ohio judicial system until 2002, it was "well-established that the syllabus of an opinion issued by [the Ohio Supreme Court] states the law of the case . . . [and a]s such, all lower courts in this state are bound to adhere the principles set forth therein." *Smith v. Klem*, 450 N.E.2d 1171, 1173 (Ohio 1983); *see also Cassidy v. Glossip*, 231 N.E.2d 64, 65 (Ohio 1967) (Syllabus ¶ 6: "The syllabus of a decision of the Supreme Court of Ohio states the law of the case"). Thus, in 1994 at the time of Mason's trial, the third paragraph of the syllabus in *DePew* clearly stated the binding rule that only specific assertions misrepresenting a defendant's *prior criminal history* permitted the prosecutor to offer rebuttal evidence.

Effective May 1, 2002, the Ohio Supreme Court amended the relevant rule to state that "[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes." S. Ct. R. Rep. Op. 1(B)(1) (emphasis added).

[5] The district court and the Warden both attack our opinion in *Mason I* by noting that the Ohio Supreme Court issued its opinion in *Henness* three years after Mason's trial. *See Mason II*, 396 F. Supp. 2d at 856 n.6; Resp. Br. at 59-60. The district court contended that in *Henness* the Ohio Supreme Court "iterated that the *DePew* holding only allows the State to introduce rebuttal evidence if the defendant misstates his or her criminal history." *Mason II*, 396 F. Supp. 2d at 856 n.6. The district court concluded that "[c]ounsel cannot be held ineffective for failing to anticipate the *Henness* decision's firm resolution of this issue." But as we point out above, *Henness* repeated *DePew*'s holding using almost identical language, and we disagree that our reading of *DePew* and *Henness* punishes Mason's counsel for "failing to anticipate" anything. Indeed, the district court itself described testimony presented at the evidentiary hearing that under "Ohio law as of 1994 and now, the defense does *not* open the door to rebuttal evidence unless it presents evidence that is either inaccurate or misstates some

The record also demonstrates that the trial court specifically addressed the admissibility of the prosecutor's rebuttal evidence in the context of whether Mason's counsel planned to introduce *Dr. Spare's deposition testimony*. *See* J.A. at 681-86. The record does not indicate how the trial court would have treated the prosecutor's rebuttal evidence if Mason's counsel presented only evidence detailing Mason's troubled childhood, most likely because Mason's counsel never investigated Mason's childhood nor planned to present such evidence.

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point of evidence." *Mason II*, 396 F. Supp. 2d at 847 (emphasis added).

In addition, in *State v. Durr*, 568 N.E.2d 674, 683-84 (Ohio 1991), the Ohio Supreme Court applied *DePew* in just this manner three years before Mason's trial. At the sentencing phase in that case, the prosecutor's statement included the following remark: "'The defendant's lack of prior criminal convictions. Will he take the stand with a aworn [*sic*] statement? Unfortunately, I don't know how that applies to this case.'" *Id.* at 683 (alteration in original). Noting that "[t]he record in this case is devoid of any reference by appellant or any mitigation witness that the appellant was free of criminal convictions," the Ohio Supreme Court explained that the prosecutor's "statement does violate the *DePew* standard as it improperly comments on both the appellant's unsworn statement and the appellant's prior convictions." *Id.* at 684.

Finally, as explained in text above, the record does not indicate that the trial court expressed any opinion regarding whether a mitigation presentation relying purely on family background would permit the state to introduce rebuttal evidence of Mason's prior criminal acts because Mason's counsel never advanced the possibility of such a presentation, as defense counsel instead focused only on presenting Dr. Spare's opinion concerning whether Mason was likely to be a repeat offender.

On June 27, 1994, the morning of the mitigation hearing, the trial court heard argument regarding the status of Dr. Spare's deposition and the nature of the defense's mitigation strategy. J.A. at 677-86. The prosecutor described Dr. Spare's testimony as concluding that Mason "was not likely to be a repeat violent offender, and he based that on his opinion that [Mason] had not engaged in violent conduct in the past." J.A. at 682. The prosecutor noted that Mason's counsel no longer planned to present Dr. Spare's testimony and observed that defense counsel would present testimony regarding Mason's good conduct in jail and from family members appealing for mercy, and also would argue against the death penalty based on residual doubt. J.A. at 683. The prosecutor stated his conclusion that if Mason's counsel did not intend to present "Dr. Spare's examination, [then] the State would not be in a position to rebut[] that evidence." *Id.* Mason's counsel then made a motion in limine to prevent the prosecutor from admitting the rebuttal evidence in light of the defense's intention not to present Dr. Spare's testimony but rather to pursue the limited strategy outlined above. J.A. at 685-86. The trial court stated that "[i]f you don't put on the record anymore than what the Prosecutor indicated . . . then of course that will be granted." J.A. at 686. This entire discussion focused on Dr. Spare's testimony, which, as the prosecutor indicated, involved a false statement about Mason's criminal history and thus *would* have permitted the prosecution, under *DePew*, to introduce its rebuttal evidence regarding Mason's criminal history.

Coulter's testimony at the evidentiary hearing similiarly depicted the trial court's evidentiary ruling as tethered to the consequences of introducing Dr. Spare's deposition testimony regarding Mason's criminal history and likelihood of being a repeat offender. In describing his conversation with the Public Defender's office on June 22, Coulter stated that the conversation was focused on addressing the following dilemma. Coulter explained that "[i]f we introduced [Mason's] family history and/or Dr. Spare's testimony about his ability to be rehabilitated or general characteristics as being nonviolent," then the prosecutor "was willing to bring in several different things . . . a parole violation case where [Mason] supposedly brandished a firearm . . . bringing information of [Mason's] past convictions, burglarly and trafficking and drugs . . . [and] a young girl approximately 18 years of age who had alleged that Mr. Mason had raped her, I believe, back in October of '92." J.A. at 1600-01. Coulter summarized that "the prosecutor's position was, okay, if you go with family history and/or, you know, Dr. Spare's testimony, nonviolence or his characteristics or his ability to be rehabilitated we're going to bring this evidence in." J.A. at 1601.

Later questioning clarified that the possible presentation of Dr. Spare's testimony was seen as the potential trigger that would permit the prosecutor to present rebuttal evidence. Coulter read the conclusion of Dr. Spare's report, which stated a conclusion that "[b]ased on the information available, including Mr. Mason's history, psychiatric examination, and psychological testing, [] Mr. Mason is not likely to be repeat or violent offender nor does

he have an unusual propensity to act out violently in the future." J.A. at 1730. The following exchange then occurred:

[Mr. Stebbins]: Now, when you had the discussions with Judge Wiedemann and Prosecutor Slagle about rebuttal evidence coming in, Danielle Miller [the alleged rape victim]—

[Coulter]: Yes, sir.

[Mr. Stebbins]: —Jones, brandishing a firearm, the burglary, all of those discussions, was this going to come in in rebuttal to Dr. Spare's conclusions that [Mason] would not be a, not likely to be a violent—repeat violent offender?

[Coulter]: Yes, because we were bringing up his criminal history, his history was coming up through his—from Dr. Spare's testimony.

[Mr. Stebbins]: So that comes in to rebut what Dr. Spare is going to conclude?

[Coulter]: That was part of the impression we got from the judge.

[Mr. Stebbins]: But Dr. Spare was going to testify, if he testified, that [Mason] would not be a repeat violent offender?

[Coulter]:	Correct.
[Mr. Stebbins]:	And the rebuttal would come in to rebut that?
[Coulter]:	Yes, because it was part of his history.

J.A. at 1731-32. This discussion makes clear that the admissibility of the prosecutor's rebuttal evidence hinged on whether the defense would make use of Dr. Spare's deposition testimony that misstated Mason's *criminal* history and that opined on the likelihood of Mason being a repeat violent offender. Whether the trial court would have admitted the prosecutor's rebuttal evidence in response to a defense strategy based solely on the circumstances of Mason's troubled childhood remains a hypothetical question because Coulter never planned to present such a defense.

In sum, we hold that Mason has demonstrated a reasonable probability that, had his counsel presented the mitigating evidence introduced at the evidentiary hearing, at least one juror might have been persuaded not to impose the death penalty.

3. Whether the Ohio Supreme Court Unreasonably Applied Clearly Established Federal Law in Adjudicating Mason's Ineffective Assistance of Counsel Claim

Although we have concluded that Mason has satisfied the standards required to prevail on a claim of ineffective assistance of counsel, to grant Mason's petition for a writ of habeas corpus requires holding that the Ohio Supreme Court unreasonably applied clearly established federal law in denying his claim. 28 U.S.C. § 2254(d).

In rejecting Mason's claim of ineffective assistance of counsel at the sentencing phase, the Ohio Supreme Court's opinion contained the following analysis, quoted in full:

> *Penalty Phase.* Mason argues that his counsel failed to investigate and present a life history of Mason and his psychological background so that he would not receive the death penalty. Mason also complains about the paucity of mitigation evidence presented in defense.
>
> The record, however, suggests that defense counsel had voluminous records about his history and background. Counsel prepared twelve exhibits documenting aspects of Mason's childhood, such as reports that he was beaten by his father and released by his parents to juvenile authorities, as well as early psychological evaluations, but did not present them to the jury. Mason argues that these exhibits show that a cogent, persuasive mitigation case could have been built revealing Mason's childhood exposure to violence, his dysfunctional family, and his early emotional and psychological problems.
>
> But the records also show prior involvements with the criminal and juvenile justice systems, and other unfavorable matters. Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal.

> Similarly it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation. We will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently. *State v. Post* (1987), 32 Ohio St.3d 380, 388, 513 N.E.2d 754, 762.
>
> Nor has Mason shown prejudice, the second *Strickland* requirement, namely "a reasonable probability" that different tactical choices at the penalty phase would have made a difference in the result. *See State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

State v. Mason, 694 N.E.2d 932, 956 (Ohio1998).

The Ohio Supreme Court unreasonably applied the *Strickland* standard in rejecting Mason's claim because the Ohio Supreme Court ignored the principle established in *Strickland* that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91; *see also Williams*, 529 U.S. at 396 (finding deficient performance because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Although the Ohio Supreme Court noted that

Mason's counsel "had voluminous records about his history and background" and that his counsel "prepared twelve exhibits documenting aspects of Mason's childhood" for use in deposing Dr. Spare, *State v. Mason*, 694 N.E.2d at 956, the opinion failed to consider whether Mason's counsel conducted any interviews with Mason's family members or performed any investigation beyond examining the documents that the state provided to them and talking to Mason. The Ohio Supreme Court simply asserted that Mason's counsel had made a strategic decision regarding mitigation strategy, but that court failed to assess whether a thorough and reasonable investigation supported counsel's strategic decision. This constitutes an unreasonable application of *Strickland*. *See Wiggins*, 539 U.S. at 527 (observing that "the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background—the information in the [state] records—they were in a position to make a tactical choice not to present a mitigation defense," and characterizing the state court's application of *Strickland* as "objectively unreasonable" because "the [state] court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the [state] records actually demonstrated reasonable professional judgment").

The Ohio Supreme Court also rejected Mason's claim of ineffective assistance of counsel on the ground that Mason had failed to show prejudice, but this analysis too is flawed and objectively unreasonable. The Ohio Supreme Court noted Mason's argument that a "cogent, persuasive

mitigation case could have been built revealing Mason's *childhood exposure to violence, his dysfunctional family, and his early emotional and psychological problems.*" *State v. Mason*, 694 N.E.2d at 956 (emphasis added). Despite this acknowledgment of the nature of the mitigation case that Mason argued his counsel *should* have presented, the very next sentence in the Ohio Supreme Court's opinion stated that "[b]ut the [state] records show prior involvements with the criminal and juvenile justice systems, and other unfavorable matters" and the court then observed that "Mason could not have presented *evidence as to his good character and rehabilitation potential* without risking the introduction of negative evidence by the state in rebuttal." *Id.* (emphasis added). Mentioning the possibility that presenting evidence "as to his good character and rehabilitation potential" would risk rebuttal evidence makes absolutely no sense given that the opinion *had just described* Mason's argument that his counsel should have presented a mitigation case focusing on his childhood, dysfunctional family, and his emotional psychological problems, *not* his good character or rehabilitation potential. It was objectively unreasonable to hold that Mason failed to show prejudice by invoking the spectre of rebuttal evidence responding to a mitigation strategy that Mason was not advocating.

III. CONCLUSION

For the reasons discussed above, we **REVERSE** the judgment of the district court, **GRANT** Mason a conditional writ of habeas corpus

that will result in the vacation of his death sentence unless the state of Ohio commences a new penalty-phase trial against him within 180 days from the date that the judgment in this matter becomes final, and **REMAND** the case for further proceedings consistent with this opinion.

DISSENT

BOGGS, Chief Judge, dissenting. After we remanded to give the condemned exactly what he asked for, an evidentiary hearing before a federal district judge, the learned trial judge carefully reviewed the evidence presented and correctly applied the relevant federal law under AEDPA and *Strickland v. Washington*. Today our court continues a distressing trend of finely parsing defense counsel judgments, based on the most charitable (to the condemned) or malevolent (to the defense counsel) view of facts and holds that counsel was *constitutionally* ineffective. I emphasize constitutionally because in a common-sense way, counsel was of course ineffective – his client was sentenced to death. However, that is not the standard that we are to apply, and I therefore dissent.

I. Ineffectiveness

"[T]he crux of [Mason's] challenge is that his counsel provided ineffective assistance because they failed to investigate his background and conduct any *in-depth* interviews of his family members *prior* to the decision on June 22, 1994, to limit the mitigation

presentation to appeals for mercy and claims of residual doubt." Op. at 6 (emphasis added). The emphasized portions of the above quote illustrate the two principal bases on which today's opinion rests: the *adequacy* and the *timing* of the interviews defense counsel Ted Coulter conducted with Mason's family members. Coulter's decision not to present any evidence related to Mason's family background at the sentencing phase was a strategic one, but today's opinion argues that the investigation supporting this decision was itself unreasonable.

First, with regard to the timing, the opinion places considerable emphasis on the fact that Coulter did not *verifiably* conduct any interviews with Mason's family members *prior* to June 22, 1994, the date on which Coulter, in consultation with the Ohio Public Defender's Office, made the strategic decision not to present any evidence related to Mason's family background at the sentencing phase (for fear that it would open the door to damaging rebuttal evidence). *See* Op. at 10-11. It states "Coulter's records and testimony did demonstrate that he talked very briefly to *some*, but not all, of Mason's family members, but the only conversations with family members for which Coulter's notes establish a known date took place *after* June 22. Thus, what little information Coulter learned from these brief conversations also could not have supported his strategic decision . . . ." *Ibid.* While Coulter's contemporaneous notes do not establish a date for most of the interviews he conducted with Mason's

family members,[1] it is incorrect to state categorically that "Coulter's extensive testimony at the evidentiary hearing demonstrates that prior to selecting his mitigation strategy on June 22 Coulter did *not* interview members of Mason's family." Op. at 9. Note Coulter's testimony:

Q. Now, your decision then to forego the presentation of the family history and to forego Dr. Spare's deposition —

A. Yes, sir.

Q. — at trial was based on the rebuttal that was going to come in, correct?

A. Yes, sir.

Q. And it was based on, in your opinion, the rebuttal being stronger than any mitigation that you were to get out of this, correct?

A. Yes.

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[1] Coulter interviewed Michelle Floyd (Maurice Mason's sister), J.A. 1657, 1680; James Mason, Jr. (his brother), J.A. 1654, 1680; Ruby Mason (his mother), J.A. 1680; James Mason, Sr. (his father), J.A. 1656, 1680; and Wilma Jones (his aunt), J.A. 1681. Coulter must also have spoken at some point with Tara Dyer (Mason's cousin), because he called her as a witness during the sentencing phase. J.A. 724. Coulter's notes indicate that he conducted phone interviews with Michelle Floyd and Ruby Mason on June 26 (though it is not clear that this was the only time he ever spoke with them). J.A. 1334. There is no indication when the other interviews may have taken place. Coulter could not remember whether he had ever interviewed four other of Maurice Mason's siblings, and there was no evidence to suggest that he had.

Q. Now, this was based on what you have stated is brief interviews with Mason's family, is that correct?

A. Correct.

Q. And that's the information that you based your decision on correct?

A. Yes, sir.

J.A. 1736. Coulter unequivocally testified that his strategic decision *was* based on the interviews he conducted with Mason's family, which leads one to believe that he must have conducted at least *some* of the interviews before making that decision. Nevertheless, Coulter could not remember — testifying ten years later — the exact dates of those interviews, and he would commit only to having conducted them prior to the mitigation hearing itself. J.A. 1655. Thus, the best that can be said for the opinion is that Coulter's testimony *fails to establish* whether (or which of) the interviews were conducted before June 22. But Mason bears the burden of establishing the inadequacy of Coulter's investigation — Coulter is not responsible for proving the opposite, ten years after the fact. Moreover, there is no dispute that Coulter addressed mitigation matters to some extent with Maurice Mason himself during jail visits that indisputably occurred long before June 22. Op. at 10; J.A. 1593-94. He also spoke with Mason's wife, Terry Mason, on numerous occasions long before June 22, and she was often present during Coulter's jail visits with her

husband, some of which addressed mitigation matters. J.A. 1303-05, 1586, 1588, 1598.

Second, perhaps anticipating this argument, the opinion notes that, even if Coulter had conducted the interviews prior to June 22, his investigation was still inadequate. Op. at 11. It is asserted that the evidence that Coulter's investigation did uncover was too limited to make a reasonable decision regarding strategy, and, in fact, triggered a duty to investigate further. *Ibid.* (citing *Wiggins v. Smith*, 539 U.S. 510, 519 (2003)). The opinion places great weight on Coulter's admissions that the interviews with the family members were not "in-depth" or "extensive." Op. at 9, 12.[2] And it faults him for failing to question the family members about an apparent discrepancy between what Mason's father and older brother said about family life in the Mason household (that there was physical discipline but no abuse) and what was contained in the state documents reviewed by Coulter (detailing significant physical injuries that Mason sustained, allegedly at the hands of his father). Op. at 10-11, 12.

Yet, the record makes clear that Coulter was already aware of virtually all of the details of Mason's background necessary to make a strategic

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[2] Coulter testified that these interviews were "very brief[]." J.A. 1680. Nevertheless, at least one of the interviews (with Mason's older brother) was long enough for Coulter to compile a page of notes. J.A. 1450. The notes demonstrate that Coulter learned important details regarding Mason's upbringing, including that Mason was the "wild one," that there "was a drug problem in the home," and that Mason was whipped. *Ibid.*

decision whether to pursue a mitigation defense based on family history. That is to say, *the opinion does not point to a single significant piece of evidence in the record of which Coulter was unaware due to his failure to investigate further.*[3] Rather, the record establishes that Coulter knew that there was significant domestic violence in the household, including (1) that Mason was physically abused, (2) that his father would beat his mother, (3) that the children would be tied up and whipped, (4) that his father once stabbed his brother, (5) that Mason's father "beat him with sticks while in the backseat of the car," and (6) that Mason ran away from home because his father beat him often. J.A. 1672, 1678-79, 1696-97, 2186. Coulter was similarly aware of the extensive drug abuse in Mason's home, including (1) that Mason's parents had "been selling dope before [he] was born," J.A. 1236, 1672, (2) that they

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[3] To be sure, there are some details that might have emerged from exhaustive further investigation. For example, there is an instance in which Mason witnessed his mother shoot his father (non-fatally). There is also evidence that Mason's father ran a prostitution ring, but, as the district court stated,

> the duty to investigate further is triggered only when the information that trial counsel already reviews warrants further investigation. *Wiggins*, 539 U.S. at 527. Neither defense trial counsel here encountered any information in either their interviews with family members or their review of documents that suggested that the Petitioner's father was involved with prostitution. Thus, counsel could not have reasonably known about it nor were they constitutionally required to discover its existence.

J.A. 105.

started selling cocaine by the mid-1980s, J.A. 1672, (3) that they had drug-trafficking convictions, J.A. 1679, (4) that Mason started using drugs himself "in the middle elementary grades," J.A. 1179, (5) that he would steal his parents' drugs (for which he would be punished), J.A. 1180-81, 2277, and (6) that Mason "got into cocaine at age 14," J.A. 2240.

Thus, even if Coulter had done everything that the opinion would require of him (*e.g.*, contacting every single family member, or conducting more interviews of "greater depth"), he would have learned *virtually nothing* that he did not already know. This stands in stark contrast to Wiggins, in which trial counsel's failure to investigate left a litany of horrific details of Wiggins's childhood undiscovered.[4] Indeed,

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[4] These include that Wiggins's mother

> frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and . . . the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a

compared to trial counsel's investigation in *Wiggins* — which was limited to the review of a one-page presentence report and some rudimentary social services documents[5] — Coulter's investigation was extraordinarily thorough: he reviewed Mason's criminal records, juvenile records, Children's Services records, counseling records, and educational records (described by the opinion as "voluminous," op. at 10); he spoke with Mason's probation officer, Lowell Titus, who was also Mason's father's probation officer; he arranged for a psychiatrist, Dr. Joseph Spare, to do an evaluation of Mason's mental health, including some exploration of Mason's troubled childhood;[6] he spoke with the deputy

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Job Corps program and was allegedly sexually abused by his supervisor.

Wiggins, 539 U.S. at 516-17 (citations omitted).

[5] Wiggins's defense counsel also arranged for a psychological evaluation, but, unlike Mason's psychiatric evaluation, the evaluation of Wiggins "revealed nothing . . . of [his] life history." *Wiggins*, 539 U.S. at 523.

[6] The opinion describes the evaluation as "limited . . . solely to determining Mason's potential for rehabilitation and the likelihood of future dangerousness; Dr. Spare did not cover Mason's background or childhood in any great detail." Op. at 9. Although Coulter did describe the evaluation as "very limited," J.A. 1637, Dr. Spare described it as a "more in-depth evaluation of [Mason's] situation and background, including some personality evaluation," J.A. 1178. However one chooses to characterize it, Dr. Spare clearly did go into some depth on the issues of drug abuse and physical violence in the Mason household. *See* J.A. 1178-83. As previously noted, Dr. Spare took a "relatively extensive oral history from Mason" that "recounted essentially all of the facts that, according to [the] court, were not discovered by defense counsel." *Mason v.*

sheriffs who encountered Mason in jail; he talked with Mike Ring, a Children's Services worker who was familiar with Mason's case; he interviewed Mason himself and Mason's wife about Mason's background and family life; and he interviewed (however briefly) Mason's father, mother, brother, sister, and aunt.[7] J.A. 1585-98, 1654-57, 1680-81.

Although one might argue that Coulter's decision to forego a mitigation defense based on family history was a foolish one, it was not the product of a constitutionally deficient investigation. There is nothing that any further investigation would have revealed that would have led Coulter to weigh his options differently and come to a different conclusion. He possessed all of the essential facts regarding Mason's background necessary to make a reasonable strategic choice. The opinion basically second-guesses that choice, and in so doing, applies the very hindsight that *Strickland* forbids.

II. Prejudice

Because Mason fails to carry his burden of demonstrating that Coulter's investigation was constitutionally inadequate under *Strickland*'s first prong, there is no need to address prejudice. The opinion is quite clear in holding that counsel was ineffective, not for making the strategic choice to rely

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Mitchell, 320 F.3d 604, 644 (6th Cir. 2003) (Boggs, J., dissenting in part).

[7] Coulter also presumably spoke with Mason's cousin, Tara Dyer. *See* n.1 *supra*. The opinion describes this entire group as a "small subset" of Mason's family, op. at 12.

on residual doubt at sentencing, but for failing to conduct a sufficiently thorough investigation to support that choice. Thus, in order for there to be prejudice resulting from this error, it must be because a competent defense attorney, having conducted a more thorough mitigation investigation, would instead have made the *opposite* strategic choice — electing to present a mitigation defense based on Mason's troubled upbringing rather than relying on residual doubt. But there is absolutely no reason to believe that *any* competent defense counsel would ever have made this choice, no matter the extent of the mitigation investigation, because the trial judge (according to Coulter) would have allowed the prosecution to introduce damning rebuttal evidence, including, *inter alia*, the testimony of an eighteen-year-old woman who had previously been raped by Mason — a crime "eerily similar" to the one for which the jury had just convicted him. *See Mason v. Mitchell*, 320 F.3d 604, 646 (6th Cir. 2003) (Boggs, J., dissenting in part).

The opinion argues that the trial court was prepared to permit the prosecution's rebuttal evidence if defense counsel sought to admit *Dr. Spare's* deposition testimony, but that it never specifically addressed the potential rebuttal evidence, which remains a "hypothetical question." Op. at 14, 15. It also argues that the state of evidence law in Ohio as it existed when Mason was tried was that, so long as none of the defense witnesses misrepresented Mason's criminal history or likelihood for future dangerousness, the prosecution would not have been permitted to

introduce any rebuttal evidence. Op. at 13-14. While the opinion's views on these matters could be thoroughly controverted, I have not done so because, in a correct analysis, they are irrelevant.

Even if the opinion's analyses of Ohio evidence law and *DePew* were correct as a matter of prediction of ultimate resolution by courts of last resort, Coulter's estimation of the trial judge was that he would have permitted the introduction of the rebuttal evidence regardless. To be sure, as I stated before our remand,

> [d]efense counsel . . . could have . . . appealed a district court decision to admit Mason's negative history as rebuttal evidence. Yet we have never held that defense counsel is constitutionally obligated to take such a risk, especially when the trial court's ruling is far from clearly the abuse of discretion that would be required to overturn its evidentiary determination.

Mason, 320 F.3d at 645 (Boggs, J., dissenting in part). And it is entirely possible that, had defense counsel pursued a mitigation strategy that relied on extensively describing Mason's character and background, one of the family members might accidentally have commented in some way on Mason's criminal history, which would have opened the door to the disastrous rebuttal evidence even under the court's reading of *DePew*. (In which case, no doubt, Coulter would be accused of ineffectiveness for failing to rely solely on residual doubt.)

It is also notable, and remarkable, that the opinion waves off the likely, or plausible, outcome had the "poor me" defense been presented at trial as merely hypothetical, and never flatly states that there is a reasonable probability, *in that courtroom, at that time*, that petitioner would not have been sentenced to death, in light of the actual likelihood of the devastating rebuttal.

III. Conclusion

This opinion sets an almost impossibly high bar for defense counsel in capital cases. Defense counsel is now required "to locate and interview the client's family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others," *Van Hook v. Anderson*, 535 F.3d 458, 463 (6th Cir. 2008) (quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ¶ 10.7, at 83); he must interview them long enough so that those interviews can be characterized as "extensive" and "in-depth," op. at 9; every conceivable family member must be contacted, no matter that defense counsel has spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin (along with several non-family members), op. at 11-12; and he must do all this *even if* he reasonably believes (based on the trial court's rulings and his own reasonable interpretation of state law) that the introduction of any evidence regarding the defendant's family background could open the door to truly disastrous rebuttal evidence

by the prosecution. Nothing in *Strickland* or its progeny requires defense counsel to go to such extreme lengths in order to meet the (relatively low) threshold of "reasonably effective assistance."

For these reasons, I respectfully dissent.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. 1:99CV524

MEMORANDUM OPINION
AND ORDER

Dated: October 31, 2005

MAURICE MASON,

Petitioner,

v.

BETTY MITCHELL, WARDEN,

Respondent.

KATZ, J.,

This case is before the Court on remand from the Sixth Circuit. In its Mandate Order, the Sixth Circuit held that it could not determine from the record whether Petitioner's trial counsel were ineffective for failing to investigate and present evidence during the mitigation phase of trial. Consequently, the Sixth Circuit remanded the case to this Court to hold an evidentiary hearing on this claim. *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003). The parties then conducted discovery and the Court held an evidentiary hearing on December 29

and 30, 2003, and January 6, 2004. The parties thereafter submitted post-hearing briefs. For the reasons stated herein, the Court finds that Petitioner's counsel were not ineffective in their investigation and presentation of evidence during the mitigation proceedings of Petitioner's trial.

I. Factual Background

In this Court's prior Memorandum of Opinion and Order, it set out the following factual history, as adduced by the evidence presented at trial, upon considering the petition for a writ of habeas corpus:

> In February, 1993, Petitioner Maurice Mason, an African-American man, was a resident of Marion, Ohio. Decedent Robin Dennis, a white woman, was a resident of Richwood, Ohio, and was acquainted with Mason. Dennis was last seen alive on February 8, 1993. On February 15, 1993, Dennis's body was found in an abandoned building in a rural area north of Marion, Ohio. The coroner determined that she had died several days earlier as a result of blunt force trauma causing multiple skull fractures. The probable weapon, a blood-stained board with protruding nails, was found twenty feet from Dennis's body.
>
> Evidence that Dennis had been raped was also found at the scene. When Dennis's body was discovered, she was wearing only a bra; her jeans and panties were positioned around her ankles and lower leg. She had been strangled, and there were bruises on her

> head, face, and body. Inside and around Dennis's car, which was found near the murder site, forensic investigators discovered Nike tennis shoe impressions and type B blood, Dennis's blood type; the location of the tennis shoe marks and the blood were consistent with a struggle having taken place inside and around the car. Semen was found in Dennis's vagina and on her panties; DNA testing determined that the semen was Mason's.
>
> Two witnesses saw a person fitting Mason's description walking in the area of the murder site between 4:10 and 4:15 p.m. on the day Dennis disappeared. Police found Mason's car keys on the front seat of Dennis's car. Type B blood was found on the side of a Nike[1] tennis shoe Mason was wearing on February 12, 1993.

(Doc. No. 84, at 1-3.)

Petitioner was charged with the rape and murder of Robin Dennis. The case was tried before a jury between May 31, and June 29, 1994. The jury convicted Petitioner on both charges. Thereafter, the trial court held a mitigation hearing. During this hearing, defense counsel Lawrence Winkfield and Ted Coulter presented the testimony of Gary L. Collins and Lisa Johnston, two deputy sheriffs from

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[1] Dennis had also been wearing Nike tennis shoes at the time of the murder. Forensic investigators were unable to determine whether the shoes Mason was wearing matched the shoe marks found in and around Dennis's car.

the Marion County Jail Division. Both testified that Petitioner had not caused any major disturbances in the year that he had been incarcerated at the prison and that he was a model prisoner, (Doc. No. 40, at 4237-44). Counsel also called Ruby Mason, Petitioner's mother, as well as his brother, sister, and cousin to testify. The family members asked the jury for mercy and to spare the Petitioner's life. *Id.* at 4245; 4247; 4249; 4251.

Defense counsel then called Terry Mason, the Petitioners wife. Similar to the other family members, she pled for the jury's mercy. Additionally, Terry Mason displayed for the jury some drawings that the Petitioner had made for her since his incarceration. On cross-examination, the prosecution questions Ms. Mason regarding her recollection of the events that occurred on the day of the murder. *Id.* at 4256-65.

Finally, Petitioner testified in his own behalf in an unsworn statement. He denied killing Robin Dennis and asked the jury to sentence him to one of the two life sentences so that he could have "the chance to take [the conviction and sentence] through the Appeals Courts." *Id.* at 4280. Thereafter, the defense rested. The prosecution did not offer any evidence in rebuttal.

II. Habeas Proceeding

This Court denied the Petitioner on May 9, 2000, (Doc. No. 84). The Petitioner then filed a motion for certification of appeal pursuant to 28 U.S.C. § 2253 on June 9, 2000, to which the Respondent filed an opposing brief on June 21, 2000.

The court granted the motion, certifying all claims for appeal, (Doc. No. 90). The Court denied Respondent's motion to file a supplemental memorandum opposing Petitioner's request for a certificate of appealability on June 26, 2000, (Doc. No. 91).

Concurrent with the filing of the motion for certificate of appealability, the Petitioner filed a notice of appeal on June 9, 2000. The Sixth Circuit issued an opinion regarding this appeal on February 6, 2003, affirming in part and remanding in part this Court's decision to deny the writ of habeas corpus. *Mason v. Mitchell*, 320 F.3d 604 (6th Circ. 2003). The Sixth Circuit affirmed this Court's denial of the writ on all claims except the Petitioner's ineffective assistance of counsel during mitigation claim. It concluded that because the record before it was insufficient to determine whether Petitioner's counsel had provided him with constitutionally sufficient representation during the mitigation phase of trial, it could neither affirm nor reverse this Court's decision to deny the claim.

The *Mason* court found that while *Strickland v. Washington*, 466 U.S. 668 (1984) holds that strategic choices counsel makes after a thorough investigation of fact and law are "virtually unchallengeable," the strategic choice itself is only reasonable to the extent that counsel's investigation is reasonable. *Id.* at 620. It observed that although defense counsel had requested and received from the trial court permission to hire an investigator, the investigator's work pertained predominantly to the guilt phase of trial. It also noted that defense

counsel was in possession of "over 3,000 pages" of record concerning the Petitioner's social, educational, and criminal history. *Id.* at 622. Finally, the Sixth Circuit observed that defense counsel had prepared a videotape deposition of Dr. Joseph T. Spare, a psychologist who the trial court appointed to assist the defense at counsel's request.

After reviewing the investigation defense counsel performed, the Sixth Circuit noted several deficiencies in counsel's investigation. First, it observed that defense counsel did not appear to have interviewed any family members, including the Petitioner, regarding possible mitigating evidence. *Id.* Instead, the Sixth Circuit determined that counsel had not adequately investigated the Petitioner's background for mitigating evidence. It opined, "[h]ad counsel conducted an adequate investigation, the jury would have heard substantial evidence about how drug use and violence pervaded Mason's background and life history." *Id.* It concluded that the documents the prosecution had supplied before counsel "could not have contained anything close to the amount of mitigating evidence that could have been and later was obtained in an independent and thorough investigation," *Id.* at 623. It then held that the record before it was deficient to ascertain whether counsel had conducted an investigation into the Petitioner's background that was sufficient to cull any substantial mitigating evidence.

The Sixth Circuit next examined defense counsel's decision not to present any mitigating evidence. It noted that on direct appeal, the Ohio

Supreme Court had held that counsel's decision not to present mitigating evidence was deficient because of the Petitioner's criminal history and prior bad acts, including an alleged prior rape. Although this Court had found this holding was reasonable under *Strickland* based on the Sixth Circuit's decision in *Scott v. Mitchell*, 209 F.3d 854, 880 (6th Circ. 2000), in which the Sixth Circuit held that counsel's failure to present mitigating evidence was reasonable based on the petitioner's extensive criminal history, the *Mason* court distinguished *Scott*, stating that, because the state court in that case had held an evidentiary hearing, the habeas court was bound to the state court's factual findings. *Id.* at 625. Although the *Mason* court found that counsel may have been reasonable by deciding not to present evidence of the Petitioner's good character so as not to open the door to any damaging rebuttal evidence, it reasoned that "[t]estimony that simply put Mason's childhood into context without misrepresenting it would not have been subject to the prosecutor's rebuttal evidence, which mostly concerned Mason's character." *Id.* at 627.

Finally, the Sixth Circuit reviewed the Petitioner's inadequate psychiatric assistance claim, in which the Petitioner asserted that Dr. Spare failed to develop adequate mitigating evidence and should have been disqualified because of a conflict of interest that stemmed from his treatment of the Petitioner's wife. Because the Petitioner's mitigation defense was based on residual doubt and a call for mercy, the Sixth Circuit held that the Petitioner was not entitled to psychiatric assistance during the mitigation phase of trial under *Ake v. Oklahoma*, 470

U.S. 68 (1985). The Sixth Circuit held that the Petitioner might still be entitled to relief, however. Because a competent psychologist would have conducted an extensive investigation into the Petitioner's background and such an inquiry, in turn, would have yielded a multitude of mitigating evidence to sway the jury's sentencing decision, the *Mason* court found that the Petitioner may "still have an ineffective assistance claim for the efficient performance of defense counsel in apparently relying on Dr. Spare for an independent investigation into mitigating evidence." *Mason*, 320 F.3d at 627. The Sixth Circuit concluded its analysis of the Petitioner's ineffective assistance during mitigation claims by finding that, because he had not yet had a hearing on this issue, it must remand the matter to the district court to factually develop the claims that the Petitioner raised.

Prior to holding such an evidentiary hearing, the Court entertained numerous motions and granted several pre-hearing requests for discovery. First, the Petitioner requested funds for an investigator and expert, which the Court granted on July 18, 2003. The Respondent also moved the Court to conduct depositions and record depositions in preparation for the evidentiary hearing. The parties disputed the availability and scope of the depositions. Specifically, the Petitioner objected to questioning his attorneys and any agents thereto, *i.e.*, any mental health professionals that his attorneys hired, on the grounds that it violated the attorney-client privilege and the work product doctrine. He urged the court to limit the scope of his own deposition on the same grounds.

On October 15, 2003, the Court issued an Order regarding the availability and scope of the depositions the Respondent requested, (Doc. No. 41). The Court held that the Petitioner had waived the right to assert the attorney-client privilege or work product doctrine regarding the mitigation phase of trial. It limited this waiver, however, to permit the Respondent to question the Petitioner and counsel only about conversations that occurred in preparation for the mitigation hearings. Thus, the Court prohibited the Respondent from broadly questioning the Petitioner regarding his commission of the murder, allowing questions regarding culpability only to the extent they were discussed in preparation for mitigation proceedings. *Id.* at 5.

After the parties conducted discovery, the Court held an evidentiary hearing on this matter on December 29 and 30, 2003, and January 6, 2004. The hearing focused on only a few critical points, described below.

The Petitioner first called trial counsel Lawrence Winkfield to testify. Winkfield admitted that he was not death penalty certified when he was first appointed to the case. Upon taking the required continuing legal education courses, however, he testified that he became death penalty certified by the time the trial commenced. Winkfield further stated that he and co-counsel Ted Coulter divided their duties during trial. He recalled that his duties consisted primarily of those related to the culpability phase of trial and Coulter primarily was responsible for the mitigation preparation. Coulter then testified regarding his mitigation investigation and how he

prepared for the mitigation proceedings. He stated that he initially called the Ohio Public Defender's Office (hereinafter "OPD") to request assistance in trying the case. Specifically, Coulter contacted Jane Core, a mitigation specialist for the OPD, to discern whether her office could provide mitigation investigation assistance. The OPD stated that they would not provide counsel with any aid until counsel became death penalty certified.

Once he became death penalty certified, Coulter testified that he again contacted the OPD to ascertain whether they would provide him with any assistance. At that time, the staff at the OPD indicated that their case load was too heavy to provide counsel with any aid in the mitigation investigation but gave counsel a list of private individuals who possibly could aid counsel in obtaining mitigation evidence. Coulter stated that he contacted James Crates, a mitigation specialist, to aid him in gathering mitigation information. Counsel next applied to the trial court for funds to obtain a mitigation investigator. The trial court held a hearing on the issue of whether to provide counsel with funds to hire a mitigation specialist and forensic psychologist. Counsel sought and obtained the testimony of Dale Baich from the OPD to explain the importance of these experts in aiding the defense team to prepare for mitigation. Coulter testified that the trial judge had not encountered a request for a mitigation specialist before and appeared unpersuaded at the hearing of the importance of funding one. Additionally, the prosecutor, James Slagle, opposed the funding of these experts, asserting that because the prosecution had provided

counsel with extensive records regarding the Petitioner's history, expenditures on these experts were unnecessary. Thereafter, the trial court denied counsel's request for a mitigation specialist and reserved ruling on whether to appoint a psychologist.

Coulter stated that upon the trial court's refusal to grant counsel funds to hire a mitigation specialist or a forensic psychologist, he again contacted the OPD and spoke to Core in an attempt to procure some mitigation assistance. Although he could not recall the specifics, Coulter did recall that either he or Core mentioned the name of Dr. Jeffrey Smalldon, a forensic psychologist, but could not recall if either he or Core made any contact with him. Counsel then turned to Dr. Spare, a psychologist who head treated the Petitioner's wife, Terry Mason. He set forth his reasons for requesting the services of Dr. Spare:

> We had filed two previous motions for [sic] request for forensic psychologist and mitigation specialist with experience in death penalty cases, and [it] appeared to us that the Court was not going to grant such funds for those types of experts, and so with the idea that at least maybe we can get an MMPI or some testing we didn't have at that stage, Dr. Spare, he would be a local doctor [that] would be a lot less expensive based on the impressions I got from the Court and, therefore, I filed a motion and the conference with the prosecutor [sic] he wasn't going to prepare that, so I prepared the entry and got Mr. Slagle's signature and took it to the Court.

> And then again, as you can see by that entry, the type is different there, and I don't know if the court's secretary or myself or whatever on the judge's instruction limited the cost of that up to a total cost not to exceed $600 exclusive of court testimony.

(Doc. No. 221, at 67.) In addition to limiting the amount counsel could expend on Dr. Spare, the trial court relayed to counsel that the purpose of obtaining psychiatric assistance was to ascertain whether the Petitioner was a "repeated [sic] serial killer." *Id.* at 127. Coulter stated that the trial court was "concern[ed] about cost and [the psychologist] being local and not having to transport Maurice very far." *Id.* at 200.

Petitioner's counsel also questioned Coulter regarding his entry on the billing statement containing five hours for review of mitigation materials. Coulter testified that this was the review of over 5,000 pages that the prosecutor had provided him, (Doc. No. 221, at 75). He stated that the records contained much of the Petitioner's criminal history, including his juvenile court records, records from Children's Services, drug treatment program involvement, and some school records. He also attempted to procure additional records from the juvenile court, Marion County Children's Services, as well as Marion Area Counseling. From viewing these documents, Coulter learned that the Petitioner was born into a drug-dependent family, that the family had in the past and currently was dealing drugs, and that both parents previously had been incarcerated for drug trafficking. Coulter also

vaguely recalled his co-counsel attempting to contact law clinics or law schools to obtain assistance in the mitigation investigation but did not recall any responses to such inquiries.

Coulter spoke with James Mason, Jr., the Petitioner's older brother. James Mason, who was a guard at the Marion Correctional Institution, stated that although his parents treated everyone fairly, Petitioner often was singled out because he would run away and he was the "wild one." *Id.* at 145. He further told Coulter that although there was spanking in the family, there was no abuse. James admitted that there was a drug problem in the home. He stated that the Petitioner "ran with the wrong bunch" and that his father would tell stories of doing illegal activities without getting caught and that "Maurice tried to emulate him." *Id.* at 146. Coulter also sought out and spoke with Lowell Titus, the Petitioner's probation officer. Titus told Coulter that the family was into drugs and that the Petitioner was not a good probationer.

Coulter testified regarding the notes he had procured regarding the Petitioner's family history. He stated that he grouped this information into categories as follows:

> A: The first category seems to be when he was in Lima in a drug and alcohol program therein referring to Lima prison. [The Petitioner] talks about the interface program, the lady who ran the program, and becoming a sponsor and a drug counselor and also the lady's name, and then there's the London program. Again, if I interpret my notes

> correctly, he was incarcerated in a Snap Program, he did some testing in there called an interface program.
>
> And then on the bottom third would be in terms of two divisions. One would be in terms of some personal recollections of Maurice, said when his dad went to prison and his mom whipped him and his brothers were tied. His father tied him up too and whipped him. Defendant ran and [his father] did not catch him. Dad would whip him. His dad would beat his mom and stabbed [his brother].
>
> Tory, I believe, who is his brother, talked about [how] Maurice always was blamed, and he would say he didn't do it and always ran. His father would abuse him. He would be drunk or high, and dad sold drugs before he was born.

(Doc. No. 221, at 161-62.) Coulter also testified regarding one incident in which the Petitioner had told him that his mother's bicycle had been lost. His father accused him of selling the bicycle and began beating him. The Petitioner then ran away to avoid further beatings. Coulter recalled he talked to the Petitioner regarding mitigation at various points during the trial. He also stated that he spoke with the Petitioner's family members briefly, calculating that the interviews took minutes, rather than hours.

In preparation for mitigation, Coulter stated that he read the transcripts from the two other death penalty cases from Marion County, the David Penton case and the Joseph Murphy case. Coulter also

contacted Mr. Robert Wilson, Murphy's attorney, regarding his representation of Murphy. In that case, also tried before Marion County Common Pleas Judge William Wiedemann, Wilson had presented during mitigation an extensive life history and background of Murphy in hopes of building juror sympathy for him and to avoid a death sentence. Despite presenting this evidence, however, Murphy's jury sentenced him to death.

Coulter next testified regarding the issue of the State's ability to call rebuttal witnesses. Through ongoing pre-trial discovery, Coulter learned of the prosecution's intent to call rebuttal witnesses at the mitigation phase of trial. He stated that Slagle informed him that if he introduced evidence of the Petitioner's family history or his non-violent character, the prosecution intended to raise several issues in rebuttal. Coulter testified that Slagle would raise evidence of a parole violation where Petitioner allegedly brandished a firearm before a woman named Barbara Jones, another incident where he allegedly pushed a woman, and past convictions for burglary and drug trafficking. By far the most damaging rebuttal information in the hands of the prosecution was the allegation that the Petitioner had previously raped an eighteen-year-old girl named Danielle Miller in October, 1992, a few months before the rape and murder of Robin Dennis. Coulter noted the similarities between the Dennis murder and the Miller attack:

> [S]he was similar [sic] aged to the victim of this case alleged and I think she was around 18 years of age. The allegation of rape

> occurred approximately three or four months before this alleged incident, and there was a threat of force, and . . . our concern was that the jury would see through her, possibly the pain, and it would be damaging to our plea for his life.

Id. at 201.

Coulter stated that he spoke briefly with the Petitioner regarding his alleged rebuttal evidence. Regarding a past burglary charge, the Petitioner referred counsel to Dave "Chicken" Brown as someone who could reveal how the burglary had actually occurred.

Coulter testified that he believed that, pursuant to *State v. DePew*, 528 N.E.2d 542 (Ohio 1988), much of the information regarding the Petitioner's prior bad acts and character would not be admissible during the mitigation proceedings. According to his interpretation of *DePew*, the prosecution could introduce rebuttal evidence if the defense misrepresented the Petitioner's criminal record, but that much of the mitigation information defense counsel intended to introduce would not open the door to the State's rebuttal evidence.

The trial court, Coulter testified, held an *in camera* conference on whether *DePew* permitted the prosecution to use its rebuttal evidence. Coulter stated that the judge's interpretation of *DePew* was vastly different from his own. Rather than limiting the prosecution's ability to introduce rebuttal evidence, the trial judge intimated that if counsel were to raise the Petitioner's family history as a

mitigating factor as to why the criminal act may have occurred, then defense counsel would open the door for the state to rebut this explanation of the Petitioner's background with damaging information regarding the Petitioner's prior criminal record and bad acts.

Coulter testified that even if he had omitted Dr. Spare's testimony regarding future dangerousness and presented only the testimony regarding the Petitioner's family history, he believed Judge Weidemann had a "hair trigger" regarding the introduction of any rebuttal evidence, *i.e.*, the trial court believed that *DePew* opened the door for the prosecution's rebuttal evidence even if counsel had merely presented evidence of the Petitioner's background and did not present any evidence of the Petitioner's non-violent character, (Doc. No. 221, at 227-28). Coulter admitted that, based on the trial court's interpretation of *DePew*, he was "totally torn" as to whether he should introduce the Petitioner's family background evidence during mitigation, (Doc. No. 122, at 92).

To amply assess the possible damaging effects of Danielle Miller's testimony, Coulter stated that he traveled to Fulton, Ohio to interview her. Coulter had learned through discovery that Miller was reluctant to testify and he was hoping that she would not be willing to do so at the mitigation hearing. Coulter testified that to the best of his recollection, he eventually made contact with her on June 26, 1994. At that time, Miller told him that the Petitioner had raped her and that she would be willing to testify about the rape during trial.

Consequently, Coulter testified, he held a conference call with Core and Dick Vickers from the OPD, Mike Geis from the Ohio State University linguistics department, and co-counsel Winkfield regarding whether to pursue a strategy of family history coupled with an assertion of non-violence that would open the door to the prosecution's rebuttal evidence or to pursue a strategy in which counsel would assert residual doubt and plead for mercy. Upon the conclusion of the conference, the consensus was that counsel should not choose a strategy involving the Petitioner's family history because of the State's ability to introduce damaging rebuttal evidence.

Instead, Coulter testified that he and co-counsel decided that they would pursue a residual doubt/mercy strategy. He stated that he thought he had a good argument for residual doubt: "[W]e felt we had a legitimate argument because . . . again, referring back to the record, I think there was one juror, even post-trial issues showed [the juror's] hesitancy with the verdict," (Doc. No. 122, at 210).

After counsel finished questioning Coulter during the evidentiary hearing, the Court asked Coulter whether, if the trial court would have provided unlimited funds, he would have altered his decision to present the mitigation defense they chose. The colloquy went as follows:

> THE COURT: But as it turned out, Mr. Coulter had you been given substantially more funds by Judge Wiedemann, it would have still come down, would it not, in your opinion then held, as to the viability or strength of your

> mitigating evidence against the strength of the prosecutor's rebuttal evidence?
>
> THE WITNESS: We would have still had to weigh it, yes, Your Honor. The discussion as we had more information psychologically or evidentiary-wise with a mitigation specialist you could weigh it and go with that strategy.

(Doc. No. 221, at 228-29.)

The Petitioner next called Donald C. Schumacher, at attorney who testified regarding the professional standards as of 1994, when the trial occurred. He asserted that an attorney in a capital case must make himself or herself familiar with friends and family members who would be a natural group to interview to glean any mitigation information. He stated that defense counsel should start planning immediately to secure some expert assistance to aid the defense team. He also asserted that relying on lack of future dangerousness as a mitigating factor had the potential of turning the jury against a capital defendant if counsel failed to establish this fact to the jury. Schumacher asserted that, pursuant to his interpretation of Ohio law as of 1994 and now, the defense does not open the door to rebuttal evidence unless it presents evidence that is either inaccurate or misstates some point of evidence. Finally, he testified that if a trial court were to deny defense counsel adequate funds to investigate a defendant's social or mental history, then counsel would be obligated to obtain this background information in preparing for the mitigation phase of trial.

Dr. Robert Smith then testified on the Petitioner's behalf. He depicted the severe dysfunctional home in which the Petitioner grew up. He described a home in which both parents were daily drug users as well as drug traffickers, where the children were isolated from both authorities and other children whose parents did not purchase drugs from the Petitioner's parents. He described the Petitioner's father as being repeatedly violent when intoxicated, particularly towards Ruby Mason and the Petitioner. Dr. Smith also described one occasion when Ruby Mason shot her husband while the children were in the home. He revealed that, in addition to drug trafficking, James Mason, Sr. was involved in prostitution activities.

In addition to reporting on the Petitioner's home life, Dr. Smith testified regarding the Petitioner's mental health. He stated that, largely because of the effects of the home environment, the Petitioner had a borderline personality disorder. When afflicted with this disorder, he explained, an individual has no self-image or self-concept. They have very strong fears and have difficulty forming relationships with others, in part because of their severe mood swings and suicidal tendencies. He also diagnosed the Petitioner with having a substance dependence.

The Court questioned Dr. Smith regarding his opinion of Dr. Spare's evaluation. In response to the Court's questions, Dr. Smith testified that, given the financial constraints under which the trial court placed Dr. Spare, he could not have conducted a meaningful psychological evaluation of the

Petitioner. Second, Dr. Smith stated that any conflict of interest under which Dr. Spare labored because of his prior treatment of Terry Mason was not relevant to any issue other than a code of ethics to which Dr. Spare would have been bound. Finally, Dr. Smith conceded that, given the financial constraints under which Dr. Spare had to operate, Coulter's request that he focus on the Petitioner's future dangerousness made little difference in the outcome of the examination.

The Petitioner next called Dr. Jeffrey Smalldon, a psychologist who examined the Petitioner during state post-conviction proceedings. Dr. Smalldon testified regarding how he typically performs a forensic evaluation for a capital case. He also stated that to cull all of the necessary background information, a forensic psychologist must perform an in-depth investigation into a defendant's background. Dr. Smalldon opined that, given the limited funds provided by the trial court, Dr. Spare could not have performed an adequate forensic evaluation. He further questioned whether Dr. Spare was sufficiently qualified to perform such an evaluation in a capital case or perform a Minnesota Multi-Phasic Personality Inventory test. Dr. Smalldon questioned the validity of Dr. Spare's diagnosis because it was based on limited examination of the Petitioner and review of the records.

In addition to his examination of the Petitioner during the state court proceedings, Dr. Smalldon stated that he re-evaluated the Petitioner for purposes of the evidentiary hearing. In his

testimony, he largely repeated the family history first relayed to the Court by Dr. Smith. He stated that, had he been asked to testify during the mitigation proceedings, he would have attempted to humanize the Petitioner, placing his actions in the context of his family and social background. On cross-examination, however, Dr. Smalldon conceded that he did not come to a final diagnosis of the Petitioner.

James F. Crates, a mitigation specialist, next testified on the Petitioner's behalf. He explained that his role in a capital case is to conduct an inquiry into a defendant's social and psychosocial history. He testified that trial counsel contacted him during the course of the trial but that he did not actually work on the case until 1996, during state post-conviction proceedings. At that time, he had a conversation with Ruby Mason regarding the Mason home. Ruby Mason described the drug trafficking and physical abuse in the home, as well as the Petitioner's experimentation with drugs by age eight. In the sixth and seventh grades, Crates relayed, Ruby Mason revealed that the Petitioner would accompany his father on trips to purchase and sell drugs.

Several of the Petitioner's family members also testified during the evidentiary hearing. First, the Petitioner's father, James Michael Mason, Sr., stated that he and his wife fought on occasion but that he "always lost," (Doc. No. 222, at 424). He described his drug business as home based but stated that he had ten people working for him selling drugs. He stated that these workers provided

financial support to his wife and family while he was incarcerated. He further stated that his relationship with his wife was good during his time in prison, and that she and the children would visit him every visiting day. James Mason also admitted to running a prostitution ring for approximately three years.

Regarding his relationship with the Petitioner, James Mason stated that while he was incarcerated, the Petitioner began running away from home and stealing. After departing prison, he stated that to punish the Petitioner for stealing, he would whip him. He also revealed that the Petitioner at one point had the "worst juvenile record in Marion county." *Id.* at 442. Despite his court involvement for stealing, James Mason described his son as a non-violent person who had a good reputation in the Marion, Ohio community.

The Petitioner's first cousin, Minnie Range, testified during the hearing. She testified regarding the strained relationship between Ruby and James Mason. She also stated that Ruby shot James because of his involvement with prostitution. James Mason, Jr., Mioshi Mason, and Michelle Floyd, all siblings of the Petitioner, testified regarding their childhood in the Mason home. Each reiterated prior testimony regarding the drug use in the home and the isolation they suffered from children whose parents were not drug associates of their parents. The siblings also verified that they were whipped as a means of punishment in the household.

The Respondent called two witnesses during the evidentiary hearing. First, the Respondent called Danielle Miller Richardson. She stated that in

1992, she and the Petitioner were about to engage in consensual intercourse when they were interrupted by her friend before any sexual contact occurred. The following week, the Petitioner came to her home and told her that he wanted to speak with her. She entered his car and he told her that they were "going to finish what we had previously started." *Id.* Although she attempted to exit the vehicle, Richardson testified that the Petitioner smacked her in the face and told her to shut the door. She then described the rape and disclosed that he twice went to reach underneath his seat, where Richardson was aware that he kept a gun. At some point during the rape, Richardson testified, the Petitioner stated that he was going to have to kill her. He did not harm her, however, allowing her to walk back to her home.

The Respondent next called Nancy Fortner Bernard, a prior girlfriend of the Petitioner's. She stated that in 1993 counsel Winkfield contacted her prior to trial. She told Winkfield that the Petitioner had been violent with her when they were seeing each other in the 1980s. Additionally, she stated that during the time in which she was romantically involved with the Petitioner, they had gone to the location which was later to be the site of the Dennis murder. After her testimony, the evidentiary hearing concluded. The Court thereafter permitted the parties to submit post-hearing briefs, (Doc. Nos. 226, 228, 229, 230).

III. Applicable Law

A. Decisional Law

The *Strickland v. Washington*, 466 U.S. 668 (1984) test, pronounced over twenty years ago, is the familiar standard for evaluating ineffective assistance of counsel claims. Specifically, *Strickland* dictates that a petitioner must satisfy a two-prong test to establish ineffective assistance of counsel. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. The *Strickland* Court held that, "[t]his requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To assert a successful ineffective assistance of counsel claim, a petitioner must point to specific errors in counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, the *Strickland* Court held, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. As the Supreme Court recently affirmed, "'Judicial scrutiny of a counsel's performance must be highly deferential' and . . . 'every effort [must] be made to eliminate the distorting effects of hindsight,

to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Bell v. Cone*, 535 U.S.685, 698 (2002)(quoting *Strickland*, 466 U.S. at 689).

Since the Supreme Court decided *Strickland*, that Court, as well as the Sixth Circuit Court of Appeals, has issued several important opinions expounding on the *Strickland* standard. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court held that counsel's failure to investigate and present to the jury mitigating evidence constituted a Sixth Amendment violation. There, the Court held that trial counsel's failure to discover evidence of the petitioner's difficult childhood was a Sixth Amendment violation.[2] The Court found that counsel's decision not to expand their investigation in the wake of reviewing several documents diagnosing the petitioner's mother as an alcoholic and the petitioner's placement in several foster homes was an abdication of the duties imposed on counsel pursuant to *Strickland*.

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[2] The Court noted the extensive hardships the petitioner faced during childhood:

> [P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. . . . Petitioner's first and second foster mothers abused him physically and . . . the father in his second foster home repeatedly molested and raped him.

Id. at 516-17 (citations omited).

The *Wiggins* Court cautioned, however, that "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. While *Strickland* established that strategic decisions can be virtually unchallengeable, the *Wiggins* Court emphasized that these decisions are not immune from attack if they are founded upon an unreasonable investigation. *Id.* Finding that the information the petitioner's trial counsel already had reviewed triggered a duty to investigate the petitioner's background further, the Court held that trial counsel's actions were objectively unreasonable under *Strickland.*

The Supreme Court again emphasized counsel's duty to investigate for mitigating evidence in its recent decision *Rompilla v. Beard*, _ U.S. _, 125 S.Ct. 2456 (2005). There, the Court held that defense counsel had a duty to investigate for mitigating evidence despite the defendant's and his family's insistence that none existed. The Court found counsel's performance ineffective when they failed to review the court file containing the defendant's prior convictions, even though counsel knew that the prosecution would be using this conviction, including reading portions of a prior trial transcript in which the defendant committed a similar offense to the one at issue during trial, to bolster its support for an aggravating factor during the sentencing proceeding. *Id.* at 2464. While the Court credited counsel with some efforts to obtain mitigating evidence, it held that counsel's failure to review the prior conviction file, despite their

knowledge that the prosecutor intended to utilize it and the ease with which counsel could have obtained it, rendered their assistance below the constitutional minimum required under the Sixth Amendment. *Id.* at 2467.

The *Rompilla* Court also was concerned with the multitude of mitigating evidence to which counsel would have availed themselves had they reviewed the prior conviction file. Records contained in this file revealed that the defendant was reared by alcoholic parents, that Rompilla's father regularly beat him and his mother, that the family home was filthy, and the children were not given clothing, attending school "in rags." *Id.* at 2468-69. Based on these circumstances, the *Rompilla* Court held that counsel's failure to review the prior conviction file prejudiced the outcome of the sentencing proceeding.[3]

The Sixth Circuit Court of Appeals also has issued several recent opinions regarding counsel's

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[3] In her concurring opinion, Justice O'Connor took pains to observe that, contrary to the dissent's contention, the Court was not holding that counsel must always review all documents in a prior conviction file. *Id.* at 2469. Instead, she opined, three circumstances of that particular case required counsel to make this inquiry. First, she noted that defense counsel were aware that the prosecution was going to use details of the prior conviction to prove an aggravating circumstance. Moreover, defense counsel knew that the prosecution's use of the prior conviction would undercut counsel's planned mitigation strategy of arguing residual doubt. Finally, Justice O'Connor reasoned that counsel's failure to review the prior conviction file was a result of counsel's inattention, rather than part of some reasoned strategic judgment. *Id.* at 2471.

Sixth Amendment obligations in the mitigation phase of a capital case. In *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003), the Sixth Circuit held that courts must review trial counsel's actions in light of the American Bar Association's guidelines. Those guidelines suggest the need for counsel to explore a petitioner's medical, educational, and employment history, as well as obtaining a family and social history through, *inter alia*, contact with family members. *Id.* at 487 n.2. The guidelines also state the necessity of reviewing a multitude of records to provide counsel with clues regarding the client's "childhood abuse, retardation, brain damage, and/or mental illness . . . ." *Id.*

Moreover, in *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003), the Sixth Circuit held that counsel acted in violation of *Strickland* when they failed to procure evidence that the petitioner sustained a brain injury that impaired his brain functioning. *Id.* at 794. Although aware of this injury, counsel did not investigate its occurrence or the possible impact it may have had on the petitioner's behavior and commission of the crime. Moreover, counsel failed to present any mitigating evidence, other than the petitioner's unsworn statement, during the mitigation phase of trial. The Sixth Circuit held that counsel's failure to investigate could not be part of a reasonable trial strategy. *Id.* at 795. Thus, it concluded, the state court had unreasonably applied *Strickland* in its contrary finding.

In several other Sixth Circuit cases, however, the court held that counsel did not provide ineffective assistance during the mitigation phase of trial when

the petitioner could not establish how counsel's alleged unreasonable conduct prejudiced the outcome of the sentencing proceeding. In *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005), for example, the court held that counsel were not ineffective for failing to hire a mitigation psychologist until the day before the mitigation phase of trial when the defendant previously had been examined by several psychologists. The court reasoned that the petitioner could not substantiate an ineffective assistance claim because he could not demonstrate that testimony from a psychologist with more time to prepare for mitigation would have differed significantly from the testimony the psychologist actually provided during the mitigation proceedings. *Id.* at 316. Thus, the court found that the petitioner could not establish the prejudice necessary to demonstrate counsel's ineffectiveness.

Similarly, in two other Sixth Circuit opinions, the court found that petitioner could not establish that counsel's alleged acts or omissions prejudiced the outcome of the mitigation proceeding. First, in *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003), the Sixth Circuit held that counsel could not establish ineffective assistance of counsel for failure to discover evidence that the petitioner suffered from organic brain damage when the petitioner was unable to establish in any post-trial proceeding that he suffered from such a malady. Although the petitioner had presented some inferences after trial that he had brain damage and was currently suffering from schizo-affective disorder, the Sixth Circuit found such inferences could not lead it to the conclusion that counsel did not act diligently during

trial. It reasoned, "absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." *Id.* at 590.

Finally, the court held in *Smith v. Mitchell*, 348 F.3d 177 (6th Cir. 2003), that because virtually all of the mitigating evidence petitioner asserted during the habeas proceedings was presented to the three-judge panel during the mitigation hearing, the petitioner could not establish prejudice under *Strickland*. Thus, the court found that counsel's representation was not in violation of the Sixth Amendment. *See also Clark v. Mitchell*, 425 F.3d 270, __ (6th Cir. 2005) (holding that counsel were not ineffective for failing to present mitigating evidence that was substantially similar to that presented during mitigation hearing).

B. American Bar Association Guidelines

Several of the cases examined above uphold the American Bar Association (hereinafter "ABA") guidelines as the paradigm for defense counsel performance in capital cases.[4] These guidelines set forth instructions regarding how trial counsel should prepare for the mitigation phase of a capital trial. The guidelines state, in regard to mitigation, that counsel should begin their initial preparation for

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[4] The ABA has published several editions of the Guidelines. For purposes of performing a proper *Strickland* analysis, the Court utilizes the 1989 edition of the guidelines as that was the most recent edition published at the time of the Petitioner's trial.

that phase of trial "immediately upon counsel's entry into the case and should be pursued expeditiously." ABA Guideline 11.4.1 (1989). It further states that any investigation for the sentencing phase of trial should include, but not be limited to:

> medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma, and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

ABA Guidelines at 11.4.1.(2)(B) (1989).

In addition to this extensive investigation, the guidelines propose several steps for counsel to take in preparation for their mitigation presentation. They suggest that counsel discuss the sentencing phase with the client. ABA Guideline 11.8.3 (1989). While the guidelines emphasize that the preparation for each case is necessarily distinct because it must involve an assessment of the individual defendant, it lists topics that counsel should consider presenting during sentencing, such as: (1) medical history; (2)

educational history; (3) military service; (4) employment and training history; (5) family and social history; (6) rehabilitative potential of the client; (7) record of prior offenses; (8) expert testimony concerning any of the above . . . . ABA Guideline 11.8.6 (1989).

The commentary to the guidelines emphasizes that counsel must be proactive in their mitigation investigation and preparation. It states:

> Obviously, the uniqueness of every client makes guidelines as to the sentencing phase a starting point, not a checklist. However, counsel in every capital case should consider strategies offered by other attorneys, discussed in the literature or otherwise available for consideration. Counsel may not choose, without investigation and preparation, to sit back and do nothing at sentencing.

ABA Guideline 11.8.6. cmt.(1989).

IV. Discussion

A. Counsel's Mitigation Investigation

Based on the testimony presented during the evidentiary hearing, particularly that of Coulter, it is clear that defense counsel did not inadequately prepare for the mitigation proceedings. As stated above, counsel were aware of a multitude of mitigation evidence that they could have presented during mitigation. First, counsel knew about the drug culture that prevailed in Mason's home, that his parents were drug dealers, and that both had served time in prison for drug trafficking. Counsel were also aware that Mason was heavily addicted to

drugs and was involved in drug sales. Moreover, contrary to the *Mason* court's assertion, 320 F.3d at 622, counsel were aware after deposing Dr. Spare in 1994 that Mason began using drugs during his childhood years.[5]

Based on the testimony obtained during the evidentiary hearing, counsel were aware of the physical abuse that occurred in the Mason home. Counsel knew that the Petitioner's father became violent with him and his brothers and that his mother beat him while his father was in prison. Counsel were also aware of the incident in which the Petitioner's father accused him of stealing his mother's bicycle and the Petitioner's subsequent attempt to run away from home. Finally, Coulter knew about the physical violence that occurred between the Petitioner's mother and father.

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[5] During the 1994 deposition, counsel questioned Dr. Spare regarding the Petitioner's admissions to him regarding his family's drug use:

> Q: Did he relate to you how he felt about that environment as he grew up in it?
>
> A: Well, it was interesting, he said he was embarrassed that it was known in the neighborhood that his family were drug people. That didn't keep him from becoming drug involved at a fairly early age, however.
>
> * * *
>
> He started having difficulty with rules and regulations and being consistent probably in the middle elementary grades, and started to use drugs at about the same time and seemed to become a more pervasive problem as time went on.

(Doc. No. 151, Exh. 1, at 9-10.)

While Coulter obtained much of the information regarding the Petitioner's background from the voluminous documents supplied to him by the prosecution, he also sought and obtained additional records from the juvenile court, Marion County Children's Services, as well as Marion Area Counseling. Although unsuccessful, counsel also sought the services of the OPD to aid them in their mitigation investigation. Finally, while Coulter conceded that his interviews with family members were brief, he learned from them that the Petitioner grew up in a "drug house" and that his father physically abused the Petitioner and other family members.

Perhaps the only mitigating information of which Coulter was unaware was the fact that the Petitioner's father ran a prostitution ring. As the *Wiggins* Court counsels, however, the duty to investigate further is triggered only when the information that trial counsel already reviews warrants further investigation. *Wiggins*, 539 U.S. at 527. Neither defense trial counsel here encountered any information in either their interviews with family members or their review of documents that suggested that the Petitioner's father was involved with prostitution. Thus, counsel could not have reasonably known about it nor were they constitutionally required to discover its existence.

Although counsel did not procure an extensive mental health evaluation of the Petitioner, the trial court limited counsel's efforts to obtain such information. The trial court's limitation on the funding of a mental health expert obviously curtailed

counsel's endeavors to procure a full psychiatric examination of the Petitioner. Moreover, Coulter testified that the trial court directed any psychological examination to pertain to the Petitioner's future dangerousness. Thus, although Coulter initially attempted to obtain a thorough psychological assessment of the Petitioner's mental health, the trial court curtailed counsel's attempts through its funding and focus restrictions. Left with the choice of obtaining no psychological assistance or a limited one aimed at assessing the Petitioner's future dangerousness, counsel's decision to opt for the latter is not an unreasonable one under the circumstances.

Once Coulter became aware of the trial judge's opinion regarding the *DePew* holding, he thoroughly investigated the prosecution's rebuttal evidence. Coulter discussed the rebuttal evidence with the Petitioner, learning from him that a man named "Chicken" Brown could supply counsel with mitigating information regarding the Petitioner's participation in a prior robbery. Importantly, Coulter also traveled to Fulton, Ohio, where he located Danielle Miller to assess her credibility and the potential impact of her testimony.

Based on counsel's and, more specifically, Coulter's efforts to investigate and procure mitigating evidence as described above, the Court cannot find that this investigation was an unreasonable one. Unlike defense counsel in *Wiggins*, where counsel's review of limited records should have prompted counsel to investigate further or *Frazier*, where counsel knew of a brain injury but

did not investigate its possible effects on the Petitioner, defense counsel here appear to have exhausted all avenues of procuring mitigating evidence available to them. In fact, the Court is hard pressed to conjure what further investigation counsel could have performed based on the information known to counsel at the time of the trial. While counsel's development of the Petitioner's mental health status was limited, this limitation, as stated above, came at the behest of the trial court, rather than counsel's failures in attempting to procure it. Accordingly, the Court finds that, pursuant to the requirements set forth in *Strickland* and its progeny, counsel's mitigation investigation did not fall below that required by the Sixth Amendment.

B. Counsel's Mitigation Strategy

As *Strickland* teaches, strategic choices counsel make after a thorough investigation of fact and law are "virtually unchallengeable." *Strickland*, 466 U.S. at 620. This case proves to be no exception to that rule. Not only did counsel perform a thorough investigation of the Petitioner's background and social and family history, counsel's mitigation presentation strategy cannot be assailed. Counsel made this decision only after seeking advice from numerous qualified counsel such as the OPD, who had a wealth of experience in trying capital cases. Moreover, Coulter contacted attorney Wilson to gain some insight into what might occur if counsel were to choose a strategy that included introducing the Petitioner's history and social background. Obtaining advice from other counsel regarding their mitigation strategy comports with the ABA

guidelines, in which counsel are encouraged to "consider strategies offered by other attorneys." ABA Guideline 11.8.6. cmt.(1989).

Based on the trial court's interpretation of *DePew* and the damaging rebuttal evidence that the jury would have heard had counsel chosen a history and social background strategy, the Court finds that counsel were not unreasonable in deciding that a residual doubt/mercy strategy was more prudent. Unlike the views of the Sixth Circuit in *Mason*, 320 F.3d at 627 ("Testimony that simply put Mason's childhood into context without misrepresenting it would not have been subject to the prosecutor's rebuttal evidence, which mostly concerned Mason's character"), the trial court specifically held that even if counsel presented only the mitigating evidence pertaining to the Petitioner's family and social history, *DePew* would allow the prosecution to present its rebuttal evidence. Thus, counsel were faced with the Hobson's choice of either presenting the Petitioner's family background and/or character but opening the door to damaging rebuttal evidence, or presenting a more limited residual doubt/mercy strategy that could fail to humanize their client to the jury.

While depicting his family background undoubtedly would have evoked sympathy from the jury, the prosecution's rebuttal evidence, particularly the testimony of Danielle Miller, could have turned the jury against him. Moreover, counsel were aware that one juror was troubled by the guilty verdict. Thus, counsel could reasonably conclude that a residual doubt strategy might persuade the jury to

vote for a sentence less than death. Although it is tempting now to assert that counsel should have introduced evidence pertaining to the Petitioner's childhood and family background based on subsequent Ohio cases interpreting *DePew*,[6] that is not the analysis that Strickland mandates. As the *Strickland* Court held, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. In reviewing counsel's conduct based on the trial court's rulings and information they knew at the time of the trial, this Court cannot find that counsel acted unreasonably.

Moreover, based on the trial court's reading of *DePew*, it is not clear that the Petitioner was prejudiced by counsel's failure to introduce the family background evidence. It would be pure speculation to presume that a jury who heard the Petitioner's family background evidence yet also

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[6] As the Sixth Circuit observed, in *State v. Henness*, 679 N.E.2d 686, 698 (Ohio 1997), the Ohio Supreme Court iterated that the *DePew* holding only allows the State to introduce rebuttal evidence if the defendant misstates his or her criminal history. The *Henness* decision was issued three years after the Petitioner's trial. Thus, defense counsel could not have used it to bolster their assertion that *DePew* would render the prosecution's rebuttal evidence inadmissible if he presented only evidence of his family background and social history. Counsel cannot be held ineffective for failing to anticipate the Henness decision's firm resolution of this issue. *Lott v. Coyle*, 261 F.3d 594, 609 (6th Cir. 2001).

were made aware of his prior bad acts and criminal record would have spared him the death penalty. The rebuttal evidence, particularly Miller's testimony that the Petitioner had raped her a few months prior to the Dennis rape and murder, could have undercut significantly any attempts by defense counsel to portray the Petitioner as a victim of his family background and social environment. Thus, the Petitioner cannot establish, as he must under Strickland, that the failure to introduce the family background evidence rendered his sentencing proceeding fundamentally unfair.

C. Psychiatric Assistance

As the Mason court acknowledged, the Petitioner had no constitutional right to psychiatric assistance during his mitigation hearing. It observed, however, that the Petitioner "may still have an ineffective assistance [of counsel] claim for the deficient performance of the defense counsel in apparently relying on Dr. Spare for an independent investigation into mitigating evidence." *Mason*, 320 F.3d at 627. Thus, because a "competent psychiatric expert would have conduct[ed] a wide-ranging, very thorough inquiry into Mr. Mason's psychosocial background," *id.*, and Dr. Spare's review of the Petitioner was a limited one, the court reasoned that the Petitioner might have a meritorious ineffective assistance claim.

As outlined above, however, Dr. Spare's examination of the Petitioner was curtailed by the financial constraints placed on him and trial counsel by the trial court. Both of the Petitioner's psychologists, Dr. Smith and Dr. Smalldon, agreed

that with such limited funds, Dr. Spare would have been unable to perform any meaningful forensic psychiatric evaluation. Moreover, counsel attempted to procure both a mitigation expert and an independent mental health expert to examine the Petitioner. When the trial court refused, they turned to Dr. Spare as a local professional whom the trial court might agree to hire because his assistance would not require the Petitioner to be transported to another location. Finally, the trial court appeared uninterested in procuring a complete psychological evaluation of the Petitioner, instead focusing any examination on the Petitioner's future dangerousness. Thus, contrary to Schumacher's testimony, it was not counsel's strategy to focus the psychiatric testimony on this issue. Defense counsel were hamstrung by the restrictions placed upon them by the trial court. Based on these restrictions, this Court cannot find that counsel's decision to rely on Dr. Spare was an unreasonable one.

The Court also observes, as it did during the evidentiary hearing, that the trial court's financial restrictions, which in turn led to Dr. Spare's limited mental evaluation, may ultimately have had a minor impact on defense counsel's decision whether to present it during trial. Because the trial court held that this evidence, like the family background and character evidence, would have opened the door to the prosecution's rebuttal evidence, counsel's decision as to whether to introduce it during trial was substantially similar to the one they would have faced even if Dr. Spare or some other mental health professional would have conducted a thorough psychiatric examination. Thus, there is no clear

indication that defense counsel's failure to procure a full psychiatric profile of the Petitioner influenced counsel's strategic choice or the outcome of the mitigation proceeding. Accordingly, the Court finds that the Petitioner's ineffective assistance of counsel claim for relying on Dr. Spare's evaluation lacks merit.

D. The Ohio Supreme Court's Decision

In its decision affirming the Petitioner's ineffective assistance of counsel claim, the Ohio Supreme Court reasoned that counsel's actions were reasonable because they were part of a strategic decision. It held:

> Mason argues that his counsel failed to investigate and present a life history of Mason and his psychological background so that he would not receive the death penalty. Mason also complains about the paucity of mitigation evidence presented in defense.
>
> The record, however, suggests that defense counsel had voluminous records about his history and background. Counsel prepared twelve exhibits documenting aspects of Mason's childhood, such as reports that he was beaten by his father and released by his parents to juvenile authorities, as well as early psychological evaluations, but did not present them to the jury. Mason argues that these exhibits show that a cogent, persuasive mitigation case could have been built revealing Mason's childhood exposure to

> violence, his dysfunctional family, and his early emotional and psychological problems.
>
> But the records also show prior involvements with the criminal and juvenile justice systems, and other unfavorable matters. Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal.
>
> Similarly it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation. We will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently. *State v. Post* (1987), 513 N.E.2d 754, 762.
>
> Nor has Mason shown prejudice, the second Strickland requirement, namely "a reasonable probability" that different tactical choices at the penalty phase would have made a difference in the result. *See State v. Bradley*, 538 N.E.2d 373, paragraph three of the syllabus.

State v. Mason, 694 N.E.2d 932, 956 (Ohio 1998).

This Court finds the Ohio Supreme Court's decision was not an unreasonable application of or clearly contrary to any United States Supreme Court precedent. As *Strickland* requires, the Ohio

Supreme Court analyzed counsel's actions based on what reasonable counsel would have done at the time of the trial. It held that, after reviewing "voluminous records" regarding the Petitioner's history, counsel's decision to refrain from introducing evidence of the Petitioner's troubled childhood was a reasonable one based on the choices counsel faced at the time of trial. Moreover, the Ohio Supreme Court held, the Petitioner failed to demonstrate that counsel's decision not to present more extensive mitigating evidence in light of the prosecution's ability to rebut that evidence prejudiced the outcome of the trial. Thus, the Ohio Supreme Court utilized the *Strickland* two-pronged test and applied it to the strategic decisions counsel made after performing an adequate mitigation investigation. This decision is not an unreasonable application of the *Strickland* decision. Accordingly, the Court finds that, pursuant to the 28 U.S.C. § 2254(d)(1), the Petitioner is precluded from obtaining habeas relief for this claim.[7]

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[7] While the Sixth Circuit in *Mason* purports to accept the Ohio Supreme Court's finding that the rebuttal evidence was admissible under Ohio law, it nonetheless observes that *DePew* would not have applied to the introduction of the Petitioner's social background and family history mitigating evidence. *Mason*, 320 F.3d at 627. Short of finding this holding is "clearly contrary to" or an "unreasonable application of" United States Supreme Court precedent, however, this Court cannot find the claim has merit. A habeas court cannot use its independent judgment to grant a petitioner habeas relief. *Price v. Vincent*, 538 U.S. 634, 640 (2003).

V. Conclusion

For the foregoing reasons, the Court finds that after conducting the evidentiary hearing as required by the Sixth Circuit Court of Appeals, *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003), the Petitioner's claim for habeas relief based on trial counsel's inadequate investigation and preparation for the mitigation phase of trial is not well-taken. The Petition is hereby dismissed.

The Court hereby issues a certificate of appealability pursuant to 28 U.S.C. §2253(c) as to this claim for relief.

IT IS SO ORDERED.

s/David A. Katz
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX E

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2003 FED App. 0042P (6th Cir.)
File Name: 03a0042p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-3765

MAURICE A. MASON,
Petitioner-Appellant,

v.

BETTY MITCHELL,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 99-00524 – David A. Katz, District Judge.

Argued: October 24, 2001

Decided and Filed: February 6, 2003

Before: BOGGS, MOORE, and CLAY,
Circuit Judges.

COUNSEL

ARGUED: David C. Stebbins, Columbus, Ohio, for Appellant. Matthew C. Hellman, ATTORNEY

GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee. **ON BRIEF:** David C. Stebbins, Columbus, Ohio, Carol Wright, Columbus, Ohio, for Appellant. Matthew C. Hellman, Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. BOGGS, J. (pp. 56-63), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant Maurice Allen Mason ("Mason") was convicted by an Ohio jury of aggravated felony murder, rape, and having a weapon while under disability; he was also found guilty of the death-penalty specification of committing murder in the course of a rape and further specifications that involved firearms, prior felony, and prior offense of violence. Mason was sentenced to death. Mason now appeals the district court's denial of his petition for a writ of habeas corpus and his request for an evidentiary hearing. We have carefully considered all of the eight claims that Mason raises and **AFFIRM** the district court's decision to deny habeas corpus relief, but with one important exception. Mason contends that he was denied the effective assistance of counsel at the sentencing phase. Because the record as it now stands is insufficient for us to determine whether this claim has merit, we

REMAND this case to the district court for an evidentiary hearing on this one issue.

I. BACKGROUND

On February 8, 1993, Robin Dennis ("Robin"), the nineteen-year-old wife of Chris Dennis ("Chris"), disappeared. Earlier that day, Robin and Chris had socialized with Mason and other friends, and Chris and Mason had discussed trading Chris's .22 caliber Colt Frontier Scout revolver for Mason's television. The next day, Robin was reported as missing to the Union County Sheriff's Department; the report stated that Mason was the last person seen with Robin.

On February 10, 1993, Deputy Sheriff Jack Lautenslager ("Lautenslager") received a report about an abandoned car in a rural area of Marion County. Two days earlier, Lautenslager had driven through that area and seen a black man walking, whom he later identified as Mason.[1] Chevron-style shoe impressions, similar to those made by shoes that Mason and Robin owned, were found on the outside of the passenger door and on the passenger's side of the dash. Type-B blood, Robin's blood type, was found on the inside of the passenger door.[2] A set of keys, including car keys that fit a 1981 Chrysler owned by Mason's wife, was on the car's front passenger seat.

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[1] Another witness testified to seeing a person who fit Mason's description walking in the general area at that time.

[2] Type-B blood was later found on the side of a tennis shoe that Mason was wearing on February 12, 1993.

A few hours after this discovery, Dennis Potts ("Potts") of the Marion County Sheriff's Department questioned Mason about Robin's disappearance. This interview took place at the detective's office of the Sheriff's Department and lasted for eighteen minutes. On February 12, 1993, following up on information from other interviews, Potts questioned Mason again. The second interview took place in a basement interrogation room and lasted, with pauses in the questioning, for four hours. Mason appears to have understood that he was not under arrest at this time. After the second interview, Mason's parole officer took him into custody for a parole violation.

On February 13, 1993, Robin's body was found inside an abandoned building that was within eighteen minutes' walking distance from where her car had been found. She was lying face down, wearing only a bra; her jeans and underwear were pulled down to her ankles. Robin's T-shirt and car keys were under her jacket, which was found eight feet from her body with burrs and debris on it. The apparent murder weapon, a blood-stained board with protruding nails, was found twenty feet from her body. Another piece of wood found at the scene had strands of hair that matched Robin's hair. On February 15, 1993, detectives found a small blood-stained piece of metal at the crime scene, which a firearms examiner later concluded was identical to a grip-frame from a .22 caliber Colt Frontier Scout revolver and was consistent with having come from the handle of such a revolver.

On February 14, 1993, pathologist Dr. Keith Norton ("Norton") conducted an autopsy and

concluded that Robin had died as a result of blunt force trauma causing multiple skull fractures. Dr. Norton determined that the blood-stained board found at the scene and the butt of a revolver could have caused Robin's injuries. Dr. Norton also found sperm in Robin's vagina that DNA experts later matched to Mason's DNA. DNA material from Robin's underwear also matched Mason's DNA. The experts did not find DNA from anyone other than Robin and Mason.

On September 30, 1993, Mason was charged with (1) aggravated murder, with a death penalty specification that the murder occurred during the commission of a rape; (2) rape, with a prior aggravated felony specification; and (3) having a weapon while under disability, with an offense of violence specification.[3] Mason pleaded not guilty. In October 1993, the trial court found Mason to be indigent and appointed Lawrence A. Winkfield ("Winkfield") of Columbus, Ohio, as lead counsel and Ted I. Coulter of Marion, Ohio, as co-counsel.

Mason's attorneys filed numerous pretrial motions, including a request for expert assistance and a motion to suppress, both of which the trial court denied after hearing oral argument. The week before trial, defense counsel moved for a continuance, claiming that they needed more time to review the 411 pages of documents that the prosecutor had delivered to them on May 20, 1994. The trial court

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[3] On December 21, 1993, Mason was reindicted on the same charges, but with a firearm specification added to each of the three counts.

refused to grant a continuance and threatened to remove defense counsel without paying any fees. On May 31, 1994, Mason proceeded to a three-week-long jury trial; he was found guilty on all three counts.

On June 27, 1994, the trial entered the sentencing phase. Mason's mitigation case consisted of the testimony of seven witnesses and Mason's unsworn statement. On June 29, 1994, the jury recommended that Mason be sentenced to death, which recommendation the trial court adopted. On August 9, 1994, the trial court heard oral argument on and then denied Mason's motion for a new trial.

Mason then filed a timely appeal to the Court of Appeals for the Third Appellate District, asserting twenty-four assignments of error. On December 9, 1996, the Court of Appeals affirmed the trial court's judgment. *State v. Mason*, 1996 WL 715480, at *33 (Ohio Ct. App. Dec. 9, 1996). Mason thereafter filed a notice of appeal and a brief in the Ohio Supreme Court. On June 17, 1998, the Ohio Supreme Court affirmed Mason's conviction and death sentence on direct appeal. *State v. Mason*, 694 N.E.2d 932, 958 (Ohio 1998).

While his direct appeal was pending, Mason filed a state collateral attack in the Court of Common Pleas of Marion County, asserting seven assignments of error. *State v. Mason*, 1997 WL 317431, at *1 (Ohio Ct. App. June 6, 1997). On November 21, 1996, the court denied relief without holding an evidentiary hearing. *Id.* Mason appealed the dismissal of his post-conviction petition to the Court of Appeals for the Third Appellate District, which affirmed the judgment of the Court of Common Pleas

on June 6, 1997. *Id.* at *7. Mason then filed a timely appeal to the Ohio Supreme Court, which dismissed the appeal on October 15, 1997, as not involving any substantial constitutional question.

On July 15, 1999, Mason filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising twenty-five challenges to his conviction and sentence. On May 9, 2000, the district court denied Mason's habeas petition and his motion for an evidentiary hearing on various claims. *Mason v. Mitchell*, 95 F. Supp. 2d 744, 795 (N.D. Ohio 2000). The district court subsequently granted a certificate of appealability as to all claims. This timely appeal followed.

II. ANALYSIS

We review de novo the legal conclusions of a district court in a habeas proceeding. *Mitzel v. Tate*, 267 F.3d 524, 530 (6th Cir. 2001). Because Mason filed his habeas petition on July 15, 1999, after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective, this case is governed by AEDPA. *Id.* Under AEDPA's provisions, we may not grant a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the

> facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). In addition, the findings of fact made by a state court are presumed to be correct and can be contravened only if the habeas petitioner can show by clear and convincing evidence that the state court's factual findings were erroneous. *Id.* § 2254(e)(1). This presumption of correctness also applies to the factual findings made by a state appellate court based on the state trial record. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981).

AEDPA provides the following standard for determining whether a petitioner is entitled to an evidentiary hearing:

> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
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> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court interpreted § 2254(d)(1) as requiring a distinction between decisions that are "contrary to" and those that involve an "unreasonable application of" clearly established Supreme Court precedent. *Id.* at 405. A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at a different result. *Id.* A state court decision is also "contrary to" Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth" in that precedent. *Id.*

A state court decision involves an "'unreasonable application of'" clearly established Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case.' *Id.* at 407, 409, 413. We may not overturn a state decision simply because we conclude that the state court incorrectly applied Supreme Court precedent. The

state court must have applied the relevant Supreme Court precedent in an objectively unreasonable manner. *Id.* at 411.

In reviewing a state court decision under AEDPA, we must look only to the Supreme Court holdings that existed at the time of the state court's decision. *Id.* at 412. We may not base our decision on Supreme Court dicta or the decisions of the courts of appeals. *See id.*; *Mitzel*, 267 F.3d at 530-31.

A. Denial of Expert Assistance

1. Trial Phase

Mason first argues that the Ohio Supreme Court unreasonably applied clearly established Supreme Court precedent in "[p]remising [an indigent defendant]'s constitutional right to expert and investigative assistance solely on the discretion of the trial court without further review." Petitioner's Br. at 25. Indigent prisoners are constitutionally entitled to "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1991) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)). Both *Britt* and *Griffin* involved requests for free transcripts of trial proceedings. *See Britt*, 404 U.S. at 226; *Griffin*, 351 U.S. at 13. The Supreme Court has also held that psychiatric assistance is a basic tool of an adequate defense in two general circumstances: (1) "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial," and (2) "in the context of a capital sentencing proceeding, when the

State presents psychiatric evidence of the defendant's future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 74, 83 (1985). On appeal, Mason claims that *Ake* required Ohio to provide him with the following types of expert assistance: (1) a soil and debris expert to examine the soil found on the clothing and shoes of Robin, Mason and Chris; (2) a shoeprint expert to identify and compare the prints found in Robin's car with those made by the shoes of Mason, Robin, and Chris; (3) a mitigation-investigation expert to examine Mason's background for potential mitigation evidence; and (4) "an independent, competent forensic mental health expert" to help defense counsel at the sentencing phase. Petitioner's Br. at 28-33.

In this case, the Ohio Supreme Court understood *Ake* to "require that a criminal defendant be provided [nonpsychiatric] expert assistance when necessary to present an adequate defense." *Mason*, 694 N.E.2d at 943. This is consistent with the principle summarized in *Ake* that:

> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent

> defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system." To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake, 470 U.S. at 77 (internal citations omitted). The Ohio Supreme Court then held that nonpsychiatric expert assistance should be provided "only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *Id.* at 944.

We are not persuaded that the Ohio Supreme Court applied *Ake* in an objectively unreasonable manner. In *Ake*, the Supreme Court weighed three factors in determining whether access to competent psychiatric assistance was required: (1) "the private interest that will be affected by the action of the State"; (2) "the governmental interest that will be affected if the safeguard is to be provided"; and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 U.S. at 77. In this case, the Ohio Supreme Court simply

stated that trial courts have discretion in evaluating the third factor. We do not believe that this application of *Ake* was objectively unreasonable. Therefore, bound as we are by the dictates of AEDPA, we hold that Mason is not entitled to habeas relief on this claim.

2. Sentencing Phase

Even if his sanity were not a significant issue during the trial, an indigent defendant on trial for his life has the right to psychiatric or psychological assistance during the sentencing phase "when the State presents psychiatric evidence of the defendant's future dangerousness." *Ake*, 470 U.S. at 83; *Skaggs v. Parker*, 235 F.3d 261, 271 (6th Cir. 2000), *cert. denied*, 122 S. Ct. 322 (2001). The State of Ohio did not present such evidence in this case. Therefore, Mason did not have a clearly established right to any psychiatric assistance at sentencing. Regardless of the fact that he was not entitled to such assistance, Mason alleges that the psychiatrist that the trial court did provide was inadequate. However, we have previously read *Ake* narrowly, holding that the issue is whether a defendant has "access to a competent psychiatrist in preparation of his defense," *Skaggs*, 235 F.3d at 267 n.2 (internal quotation marks omitted), and not whether the expert was in fact competent. *Id.* at 272. We did note in *Skaggs* that the failure of defense counsel to engage a competent psychiatrist would be relevant in determining whether a defendant received ineffective assistance of counsel. *Id.* at 267 n.2. With respect to Mason's *Ake* claim, however, we conclude that Supreme Court precedent has not clearly established

a defendant's right to more than mere access to competent psychiatric assistance.

B. Ineffective Assistance of Counsel

Mason argues that the Ohio Supreme Court unreasonably applied clearly established federal law in concluding that he was not deprived of his constitutional right to effective assistance of counsel.[4] To establish that counsel afforded ineffective assistance, a petitioner must show that his attorney's performance was deficient, falling below an objective standard of reasonableness, and that such deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The objective standard of reasonableness is a highly deferential one and includes "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *United States v. Pierce*, 62 F.3d 818, 833 (6th Cir.

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[4] The State of Ohio contends that various sub-parts of Mason's ineffective assistance claim were not raised on direct appeal and thus were procedurally defaulted. Respondent's Br. at 25. Mason replies that he raised these issues to the Ohio Supreme Court in his brief. Final Reply Br. at 12; *see also* J.A. at 1517-18 (continuance), 1597 (expert assistance), 1598 (suppression motion), 1599 (jury selection). The problem arises because Mason filed his petition for post-conviction relief while his direct appeal was pending. Because the trial court found Mason's ineffective assistance claims to be barred by res judicata before the Ohio courts had decided his direct appeal, and because the Ohio Supreme Court eventually addressed the merits of Mason's ineffective assistance claims, we do not find procedural default and will review whether the state courts' adjudication was contrary to or involved an unreasonable application of *Strickland* and its progeny.

1995) (placing the burden on the defendant to demonstrate a constitutional violation), *cert. denied*, 516 U.S. 1136 (1996). To satisfy the prejudice requirement, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Williams*, 529 U.S. at 391 (quoting *Strickland*, 466 U.S. at 694). "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

1. Trial Phase

Mason claims that his attorneys provided ineffective assistance before trial in the following areas: (1) counsel failed to obtain certain expert and investigative assistance; (2) counsel failed to obtain the suppression of Mason's statements to the police during the February 10 and 12 interviews; (3) counsel failed to obtain a continuance; and (4) lead counsel was absent during parts of the jury selection. He also claims that he received ineffective assistance during the trial due to defense counsel's failure to prepare adequately. Specifically, he argues that defense counsel (1) "fail[ed] to provide any guidance or direction to the jury in [his] opening statement" and "fail[ed] to object to inflammatory portions of the state's opening statement"; (2) "failed to develop and communicate a theory of defense and how such a

theory related to mitigation"; (3) failed to effectively litigate the state's failure to reveal exculpatory evidence"; (4) behaved in an overly aggressive manner; and (5) failed to object to the prosecutor's blatant misconduct. Petitioner's Br. at 67-68.

We first observe that Mason's attorneys had close to eight months to prepare for the trial, during which time they filed more than fifty pretrial motions and argued at several pretrial hearings. *Mason*, 694 N.E.2d at 947. Mason's ineffective assistance claim therefore relates to defense counsel's failure to achieve substantive results rather than a failure to file procedural motions. *Cf.*, *e.g.*, *Olden v. United States*, 224 F.3d 561, 566-67 (6th Cir. 2000). However, *Strickland*'s objective standard of reasonableness does not require lawyers to be perfect. Because defense counsel advocated with vigor on Mason's behalf, we hold that Mason did not receive ineffective assistance with respect to the filing of various procedural motions. As for the fact that Winkfield was absent during parts of jury selection, we agree with the district court that this argument is not compelling because Mason consented to the absences "and co-counsel conducted an effective voir dire" during that time. *Mason*, 95 F. Supp. 2d at 788.

Mason's argument that defense counsel failed to prepare adequately for the trial is somewhat stronger, but the record does not contain a great deal of information on this issue. Lead counsel Winkfield apparently acknowledged as late as a week or two before the trial that he had not personally interviewed any of the witnesses for either phase of

the trial. J.A. at 1849 (Head Aff. at ¶ 9). He also declared less than a week before the trial started that "it would be great error for [him] to continue," J.A. at 673, because he was not prepared to go forward and "[could not] do so in good conscience and under the professional standards of the code of responsibility of [his] client." J.A. at 679. Co-counsel stated that he had prepared his part of the case but that he could not go forward without Winkfield. At this point, the trial court, distrusting defense counsel's motives, asked Winkfield whether he wanted to withdraw. When Winkfield answered that he "d[id]n't care to withdraw," the trial court stated its willingness to remove Winkfield and impose sanctions by not paying any fees. J.A. at 679. After a thirty-minute conference with Mason and co-counsel, Winkfield informed the trial court that he would stay on the case. Tr. at 700.

Although we acknowledge that attorneys' concerns about compensation may adversely affect their representation of clients, we are not persuaded that Winkfield's performance in this case was so deficient as to be objectively unreasonable. *Cf. Rickman v. Bell*, 131 F.3d 1150, 1157 (6th Cir. 1997) (holding that defense counsel, whose preparation for trial consisted solely of sixteen hours of interviews with the defendant, "total[ly] fail[ed] to actively advocate his client's cause"); *Groseclose v Bell*, 130 F.3d 1161, 1169-70 (6th Cir. 1997) (describing defense counsel's "failure to have any defense theory whatsoever" and "failure to conduct any meaningful adversarial challenge" as "especially appalling"), *cert. denied*, 523 U.S. 1132 (1998). First, despite Winkfield's protestations, the totality of the

circumstances does not suggest that defense counsel was unprepared for the trial phase. Unlike the "complete lack of pretrial preparation" that the *Kimmelman* Court decried, 477 U.S. at 385, Winkfield and co-counsel filed numerous pretrial motions and argued several pretrial hearings. Although attorneys can always do more in preparation for a trial, we cannot conclude that Mason's attorneys did not prepare enough.

Second, we are not persuaded that the acts and omissions of defense counsel that Mason identifies as evincing a lack of reasonable professional judgment in fact violated prevailing professional norms. We have read the opening statements of both the prosecution and the defense and disagree with Mason's characterizations of them. We cannot identify any "inflammatory portions" of the prosecutor's statement, Petitioner's Br. at 67; conversely, we conclude that defense counsel provided adequate guidance to the jury by clearly articulating the theory that Chris rather than Mason should be on trial for Robin's murder. Mason's *Brady*-derived claim of ineffective assistance is simply too summary for us to review. As for the depiction of defense counsel as abusive and argumentative, we recognize that the record reveals considerable animosity between the prosecutor and defense counsel, but fail to see how the latter's advocacy prejudiced Mason's defense. Finally, any failure to object to prosecutorial misconduct did not constitute ineffective assistance of counsel because, as discussed below, we do not believe that the prosecutor acted improperly. We therefore deny habeas relief with respect to this claim.

2. Sentencing Phase

Under the Eighth Amendment, the jury in a capital case may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Ohio law thus provides that, once the prosecution has proven one or more statutory aggravating circumstances beyond a reasonable doubt, the jury must weigh the aggravating circumstance(s) against the evidence in mitigation before imposing a death sentence. OHIO REV. CODE ANN. § 2929.04(B). Juries may consider as mitigating evidence "the history, character, and background of the offender," certain specified factors, and "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." *Id.* Moreover, a defendant is entitled to "great latitude" in presenting evidence of any and all mitigating factors. *Id.* § 2929.04(C).

The sole aggravating circumstance in this case was the rape. *See* OHIO REV. CODE ANN. § 2929.04(A)(7). When the trial court convened the penalty phase of Mason's trial on June 27, 1994, defense counsel offered the testimony of seven witnesses, as well as Mason's unsworn testimony, but did not inquire into mitigating evidence. The first two witnesses were deputy sheriffs from the Marion County Jail, who stated that Mason had not

been a problem prisoner.[5] Defendant counsel then called four members of Mason's family. Given no more direction than to speak on Mason's behalf, Mason's mother, brother, sister, and cousin simply asked the jury not to recommend the death penalty.

Defense counsel's direct examination of Mason's wife Terri ("Terri") was almost as perfunctory. Asked whether she had anything to tell the jury, Terri made an emotional plea for mercy. Counsel then asked Terri to identify a few pictures that Mason had drawn for her. On cross-examination, the prosecutor questioned Terri about Mason's art and his activities on the day that Robin disappeared. Redirect-, recross-, and further redirect-examination concerned Terri's interview with the police. Defense counsel did not question Terri again about mitigating evidence.

Mason himself spoke as the last mitigating witness. In his unsworn statement, he declared his innocence and requested that the jury "give me the chance to take it through the Appeals Courts." J.A. at 1255. Defense counsel questioned Mason about his drawings and then rested. The prosecutor offered no evidence in rebuttal, but emphasized during his closing argument that defense counsel had not presented any mitigating evidence about Mason's history, character, or background.

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[5] As Mason notes, defense counsel did not inquire about Mason's involvement in saving a fellow inmate from attempted suicide.

a. Failure to Investigate or to Prepare Witnesses

Mason argues that defense counsel rendered ineffective assistance by failing to conduct an independent and thorough investigation of his life history and psychological background when his family members were available for interviews, thereby foreclosing the discovery of potential mitigating evidence. He also contends that defense counsel's performance in preparing Mason's family members before calling them as mitigating witnesses was constitutionally deficient.

In examining Mason's claim of ineffective assistance at the sentencing stage, the Ohio Supreme Court inferred from the record "that defense counsel had voluminous records about [Mason's] history and background" and noted that "[c]ounsel prepared twelve exhibits documenting aspects of Mason's childhood, such as reports that he was beaten by his father and released by his parents to juvenile authorities, as well as early psychological evaluations, but did not present them to the jury." *Mason*, 694 N.E.2d at 956. The district court similarly deemed meritless Mason's claim "that his trial counsel improperly failed to investigate possible psychosocial mitigating factors that could have spared him the death penalty." *Mason*, 95 F. Supp. 2d at 793.

Much has been made in this case of the twelve exhibits that defense counsel prepared in conjunction with the videotaped deposition of Dr. Joseph T. Spare ("Spare"), the psychiatrist appointed by the trial court to assist the defense with the mitigation

phase. The mere existence of mitigation exhibits, however, is not conclusive, because the question under *Strickland* is whether defense counsel's investigation into potential mitigation evidence was constitutionally adequate:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
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> ...
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> [W]hat investigation decisions are reasonable depends critically on [the information that the defendant supplies]. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even

> harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions.

Strickland, 466 U.S. at 690-91. We have previously held that the complete failure to investigate mitigating evidence constitutes ineffective assistance of counsel. *See Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997), *cert. denied*, 523 U.S. 1079 *and* 523 U.S. 1088 (1998); *cf. Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir.) ("Without effective research into the available mitigating testimony, of course, it would be impossible for the lawyers to have made an informed decision either way."), *cert. denied*, 531 U.S. 1021 (2000). We have also emphasized the importance of an independent investigation: "The sole source of mitigating factors cannot properly be that information which [a] defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000).

The record before us is inadequate for a meaningful review of Mason's claim of ineffective assistance of counsel. We recognize that the *Strickland* Court directed state courts "to analyze effectiveness based on the then prevailing norms and counsel's perspective at the time," *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001), which entails a "highly deferential" standard. *Strickland*, 466 U.S. at 689. However, in order for us to evaluate whether

defense counsel rendered constitutionally ineffective assistance at sentencing, we must know more about the extent of counsel's investigation and preparation of mitigating evidence. There is a significant likelihood that defense counsel acted unreasonably in failing to conduct an independent and thorough investigation of Mason's background. Because the record as it now stands reflects disputes about defense counsel's performance with respect to the sentencing phase of Mason's trial, we remand the case to the district court for an evidentiary hearing on this issue.[6]

We begin our analysis of Mason's ineffective assistance claim by reviewing the investigation that apparently did take place. In the fall of 1993, soon after Mason was charged with the rape and

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[6] Judge Boggs suggests that Mason does not meet the requirements for an evidentiary hearing as laid out in 28 U.S.C. § 2254(e)(2). Although subsection (e)(2)'s conditions are, indeed, onerous, "only a prisoner who has neglected his rights in state court need satisfy these conditions." *Michael Williams v. Taylor*, 529 U.S. 420, 435 (2000). In determining whether § 2254(e)(2) applies, the question is not whether the petitioner has succeeded in developing the record, but whether the petitioner has diligently attempted to do so. *See M. Williams*, 529 U.S at 432 ("[A] failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."). Mason here has been sufficiently diligent; as the Supreme Court explained, "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. Mason requested (and was denied) a hearing in state court and has actively sought to expand the record. We see no lack of diligence, so we do not apply § 2254(e)(2).

aggravated murder of Robin, the trial court issued an order appointing an investigator for the defense and authorizing independent DNA testing. J.A. at 1954-55.[7] According to the Ohio Supreme Court:

> The defense team of two lawyers and an investigator looked fully into Mason's background. Moreover, the state had collected and released to the defense in January 1994 voluminous records concerning Mason, including records about his last nine years in and out of prison as well as school records and juvenile incarcerations.

Mason, 694 N.E. 2d at 945. The record, however, suggests that the investigator's assignment was limited to interviewing witnesses and taking measurements at the crime scene. Tr. at 35-39. Because the case against Mason was based on circumstantial evidence, we infer from the record that the witness interviews were primarily about the facts surrounding Robin's disappearance and murder. Defense counsel indicated as much when the trial court asked why a mitigation expert was necessary given the appointment of an investigator. Tr. at 452. Furthermore, Mason averred that his conversations with defense counsel and the investigator "were almost exclusively about trial phase issues – concerning witnesses, my whereabouts, Chris Dennis and other theories of who

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[7] The trial court later authorized independent laboratory testing on a sample of the fetus that Robin was carrying at the time of her murder and independent blood testing of the blood found on Mason's shoe. J.A. at 1955.

had killed Robin Dennis." Maurice A. Mason Aff. at ¶ 5. Mason's family members were also not interviewed about Mason's background. J.A. at 1992 (Terry A. Mason Aff. at ¶ 14); J.A. at 1997 (James Michael Mason Aff. at ¶ 9); J.A. at 2006 (Mioshi Mason Aff. at ¶¶ 13-14).[8]

As for the documents obtained during discovery, the trial court found that defense counsel "had in their possession and had reviewed, prior to trial, over 3,000 pages of comprehensive records and documents regarding [Mason]'s social history, including records from the Marion City Schools, Marion Area Counseling Center, Marion County Children's Services, Marion County Adult Probation Department, Adult Parole Authority, and Ohio Dept. of Rehabilitation and Corrections." *State v. Mason*, No. 93-CR-0153, slip op. at 9-10 (Ohio Ct. Com. Pl. Nov. 21, 1996). None of these documents is in the record before us.

In May 1994, before this case went to trial, the trial court appointed Dr. Spare and a forensic pathologist to assist the defense. J.A. at 1955. Dr. Spare then examined Mason and prepared a five-page psychiatric report. J.A. at 1952. On June 7, 1994, during the trial, defense counsel deposed Dr.

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[8] Lead counsel acknowledged less than a week before the trial began "that he had not personally interviewed any of the witnesses for either phase of the trial." J.A. at 1848, 1849 (Head Aff. at ¶¶ 6, 9). Moreover, counsel apparently never studied Mason's "psychological or environmental history" and failed to prepare the "social history" that would have humanized Mason before the jury. J.A. at 1856 (Schumacher Aff. at ¶¶ 24C, 24E).

Spare on videotape, using twelve mitigation exhibits. These exhibits, according to the record as it stands, appear to have been based largely on the discovery provided by the prosecution to defense counsel.[9] As noted above, defense counsel apparently never interviewed anyone, including Mason himself, about possible mitigating aspects of Mason's background, even though various family members were ready and willing to discuss his life history.[10]

Although the Ohio Supreme Court did not make an explicit finding about the extent of defense counsel's independent investigation of mitigating evidence, it did conclude that defense counsel, in choosing not to present whatever mitigating evidence was known, made a strategic decision to foreclose the state from introducing negative evidence in rebuttal. *Mason*, 694 N.E.2d at 956. Under *Strickland*, however, courts must first determine whether defense counsel's investigation decisions were

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[9] Although the trial court ordered the retention of these exhibits as part of the record, the exhibits are not in the record before us.

[10] This fact distinguishes this case from *Marion v. Mitchell*, Nos. 00-3357, 00-3359, 2002 WL 197963 (6th Cir. Feb. 7, 2002), where we recently denied habeas relief on a similar claim because the petitioner had not shown what potential mitigating witnesses "would have testified to, or how such testimony could have aided him at sentencing." *Id.* at *11; *cf. Buell v. Mitchell*, 274 F.3d 337, 361 (6th Cir. 2001). The testimony in this case concerned Mason's troubled childhood, as described below, which would have aided him at sentencing because it did not give the prosecutor the same opportunity for rebuttal that evidence about good character or rehabilitation potential could have.

reasonable. Only then may they reject a defendant's challenge to any decision characterized as strategic by defense counsel.

Had trial counsel conducted an adequate investigation, the jury would have heard substantial evidence about how drug use and violence pervaded Mason's background and life history. From the record before us,[11] we have learned that Mason's alcoholic parents were heavy marijuana users and drug dealers from the time Mason was four or five years old. Indeed, Mason's mother admitted "that for the majority of [Mason]'s life the family home was a 'drug house.'" J.A. at 1874 (Crates Aff. at ¶ 20S). Four years later, Mason began to experiment with drugs, stealing marijuana and pills from his parents' supply for his own use; by age eleven, he had become a significant user himself. About this time, Mason accompanied his father on trips out-of-state to buy drugs. By age fourteen, Mason began to use drugs with his parents; he also ran away from home. In addition to drugs, violence overran the Mason household. Mason's parents struggled through repeated bouts of domestic violence in front of their children; they also beat Mason on a regular basis for stealing their drugs and for the misconduct of his siblings, for which he was blamed.

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[11] Affidavits were submitted by (1) James Frederick Crates ("Crates"), a mitigation specialist who was retained by post conviction counsel and who interviewed Mason's mother before her death, (2) Dr. Jeffrey L. Smalldon ("Smalldon"), a psychologist, (3) Mason's father, and (4) Mason's sister.

Having received official documents from the prosecution during discovery, trial counsel appears to have been aware of some of this evidence. Mitigation Exhibit 10, for example, apparently concerned Mason's drug use as a teenager, *see Mason*, No. 93-CR-0153, slip op. at 5, but not his significant use at a much earlier age. We emphasize that the discovery documents by their very nature only concerned the Mason family's limited contacts with the authorities. For example, a record from Marion County Children's Services indicates that Mason's father was charged with assault in 1977 for beating Mason. J.A. at 1874-75 (Crates Aff. at ¶ 20W). This charge, however, stemmed from a missing person report that Mason's father himself filed with the police; Mason had run away while being disciplined. J.A. at 2000-01 (James Michael Mason Aff. at ¶ 31). The authorities do not appear to have been aware of the regular whippings that Mason suffered. Furthermore, Mason's mother never reported episodes of domestic abuse to the police, because it was "a no-no in our family . . . to call the cops . . . [W]e didn't want them around." J.A. at 1871 (Crates Aff. at ¶ 20H). Mason's mother also did not go to the hospital, where social services may have intervened and documented the Mason family's plight.

Therefore, the documents provided by the prosecution to defense counsel could not have contained anything close to the amount of mitigating evidence that could have been and later was obtained

in an independent and thorough investigation.[12] Indeed, we find it particularly telling that not even the trial court referred to any knowledge on the part of trial counsel about Mason's troubled childhood or the extent to which drugs and violence ravaged Mason and his family. We believe that it was just this evidence, which did not enter the record until the post-conviction stage, that was Mason's best hope. As we observed in *Mapes v. Coyle*, 171 F.3d 408 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999), the information about Mason's background may amount to little more than "slim evidence of mitigation, but is *something*. And what is most important, it was [his] *only* shield from a death sentence." *Id.* at 426. Yet trial counsel does not appear to have made any independent effort to investigate the particulars of Mason's history, character, or background.[13] The

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[12] Contrary to the dissent's analysis, the problem here is not that defense counsel had no knowledge of Mason's background, but that, after receiving a limited amount of that information in materials provided by the prosecution, defense counsel may not have adequately investigated the matter further themselves. Our concern is that the limited information obtained by defense counsel did not *discharge* counsel's duty to investigate, but *triggered* the duty to investigate.

[13] We find inexplicable the apparent failure of trial counsel to investigate mitigating evidence in this case. Four months before trial, the trial court heard oral argument on defense counsel's request for various experts, including "a mitigation expert team of Psychologist, Social Worker, and Mitigation Expert." Tr. at 412. Defense counsel called Dale A. Baich ("Baich"), then an assistant public defender for the State of Ohio, to testify about a defendant's need for mitigation experts. Baich described the mitigation expert's responsibilities as follows:

alleged failure of defense counsel to prepare Mason's family members for their testimony at sentencing further demonstrates that counsel conducted an inadequate investigation of mitigating evidence.

Trial counsel's failure to conduct an independent and thorough investigation may have hampered their ability to make strategic decisions at sentencing; it may also have affected their ability to give competent advice to Mason about the meaning

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> One significant role of the mitigation expert is to interview Mr. Mason about his background and then go out to interview family member, friends, acquaintances. In addition, it's important for the mitigation expert to gather records that may be existing related to Mr. Mason. I have no idea about Mr. Mason's background, but there may be some governmental records related to him that would be helpful to the defense. His school records and work records may be important for the mitigation phase.
>
> So in a sense, the mitigation expert is the one that goes out and conducts a complete family and personal background investigation on the accused.

Tr. at 421. Trial counsel understood that relying on the documents produced by the prosecution was inadequate, because interviews still had to be taken of Mason and the "significant others in his life," and the prosecution could have missed some records. Tr. at 423-25. The prosecutor argued that defense counsel had been provided with all available records and that Mason was fully able to assist in his defense. Tr. at 442-43, 446. Given defense counsel's understanding of the need for further investigation, we strongly believe that counsel may have afforded Mason ineffective assistance by unreasonably deciding not to investigate. We leave it to the district court in the first instance to determine after holding an evidentiary hearing whether the performance of defense counsel in this case failed to meet the constitutional minimum.

of mitigating evidence and the availability of possible mitigation strategies. Indeed, according to Mason, trial counsel did not offer any such advice:

> Neither of my lawyers ever explained to me what the mitigation trial is or what it was intended to prove. I had no knowledge the mitigation was intended to save my life, or that this was to be the only opportunity for me to demonstrate to the jury why I should not be given the death penalty.

Maurice A. Mason Aff. ¶ 7. The evidence in mitigation that was so readily available in this case offered an arguably reasonable probability of "humaniz[ing Mason] before the jury such that at least one juror could have found he did not deserve the death penalty." *Carter*, 218 F.3d at 592. Because we cannot determine from the record before us whether the Ohio Supreme Court applied *Strickland* unreasonably by not examining the extent of trial counsel's investigation into mitigating evidence, we remand the case to the district court with the instruction to hold an evidentiary hearing on Mason's claim of ineffective assistance at the sentencing phase of his trial.

b. Failure to Present Mitigating Evidence

Next, Mason challenges defense counsel's decision to present a limited mitigation case, when the record as it stands before us indicates that Mason grew up in a dysfunctional family and was repeatedly exposed to violence and drug use from childhood, leading to emotional and psychological problems. We have noted above that much of this

evidence does not appear to have been known to trial counsel, due to their alleged failure to conduct an independent and thorough investigation of potential mitigating evidence. Mason contends, however, that he would not have received the death penalty from any jury that heard what mitigating evidence was available.

By the time of sentencing, defense counsel had deposed Dr. Spare and prepared the twelve mitigation exhibits. They originally planned to offer as mitigating evidence the testimony of Dr. Spare, who concluded, based on Mason's past conduct, that Mason was unlikely to be a repeat violent offender. Defense counsel ultimately decided not to present this evidence, which, according to the prosecutor, was omitted in order to foreclose rebuttal evidence about Mason's history of violent conduct, allegedly including rape, brandishing a gun, resisting arrest, and burglary. Lead counsel informed the trial court that the decision not to present mitigation evidence was strategic:

> We have the consideration of Maurice Mason's life, you know, here today, and some strategies that we calculated and designed to procur[e] and achieve a life verdict even with the decision that was rendered by the jury. We are not interested in bringing up certain things or opening the door for certain things that the Prosecution has evidence, a great desire to bring before the jury.

J.A. at 1209.

The Ohio Supreme Court held that defense counsel's performance at the sentencing stage was not deficient because "the records [showed] prior involvements with the criminal and juvenile systems, and other unfavorable matters. Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal"; it also concluded that Mason had not shown prejudice. *Mason*, 694 N.E.2d at 956. The district court focused more directly on the "possible mitigating effects of [Mason's] unfortunate childhood," *Mason*, 95 F. Supp. 2d at 777, but reached the same conclusion:

> [Mason] has not suggested the existence of any mitigating factor that is not overwhelmingly negated by his history of violent criminal conduct, including a prior rape and firearms offenses, multiple parole violations, and multiple drug offenses stretching as far back as elementary school. [Mason]'s counsel's strategy of not presenting mitigating testimony in order to keep [Mason]'s extensive criminal history from the jury was objectively reasonable. Nor has [Mason] shown prejudice; on this record, Mason cannot show a reasonable likelihood that any juror who was apprised of [Mason]'s complete psychological history – including his prior criminal record – would not have voted for the death penalty.

Id. at 793 (internal citation omitted).

In rejecting Mason's claim of ineffective assistance at sentencing, the district court relied on

Scott, in which we held that defense counsel's decision not to present mitigating evidence was reasonable in light of the petitioner's extensive criminal history, which included "commission of robbery, assault, kidnapping, and other violent acts upon innocent citizens." *Scott*, 209 F.3d at 880. The potential mitigating evidence in that case, as found by the state court after a post-conviction evidentiary hearing, consisted of testimony about the petitioner's "personal loyalty to his siblings, girlfriend, and children, and an exceedingly violent environment throughout his upbringing." *Id.* Instead of pressing those points, defense counsel chose a strategy of residual doubt and only presented the petitioner's unsworn statement. *Id.*

We recognize the factual similarities between *Scott* and this case. However, after the Supreme Court decided *Williams*, we questioned whether the holding in *Scott* should be limited "to the narrow facts of a federal court contemplating a *habeas* petition after a state court has conducted an evidentiary hearing and made a finding of fact that had mitigating evidence been introduced, the defendant's recent criminal history would have been presented to the jury in rebuttal." *Carter*, 218 F.3d at 600 n.2. As we have noted above, no state or federal court had held an evidentiary hearing on Mason's ineffective assistance claim. We therefore believe that *Scott* is less relevant than it might otherwise be.

Based on the record before us, we agree with the Ohio Supreme Court that defense counsel exercised reasonable professional judgment in

deciding not to present mitigating evidence about Mason's "good character and rehabilitation potential." *Mason*, 694 N.E.2d at 956, but we reiterate that counsel may have rendered ineffective assistance in failing to investigate (and thus being unable to present) potential mitigating evidence about Mason's background. We begin by noting that we have previously deemed the failure to present mitigating evidence when it was available to be "an abdication of advocacy" rather than a strategic decision. *Austin*, 126 F.3d at 849. This holding, however, necessarily requires an inquiry into the mitigating evidence that was available at the time of sentencing.

As discussed above, trial counsel's preparation for sentencing appears to have been limited to reviewing the documents that the prosecution disclosed to them and deposing Dr. Spare, who tried "to determine mitigation" and "to attempt to determine the likelihood of [Mason] being a repeat violent offender and/or his potential for rehabilitation." Smalldon Aff. at ¶¶ 10-11. Dr. Spare concluded his report to defense counsel by predicting Mason's future behavior: "Based on the available evidence, Mr. Mason is not likely to be a repeat violent offender under ordinary circumstances. . . . [His] pattern is that of avoidance and running away as opposed to aggressive violence." Smalldon Aff. at ¶ 17. Therefore, the mitigating evidence available to defense counsel at sentencing concerned Mason's interactions with the state and Dr. Spare's assessment of Mason's character.

In dismissing Mason's petition for post-conviction relief, the trial court referred to the twelve mitigation exhibits in finding that "[t]he evidence regarding [Mason's] background which he now contends should have been introduced, was considered by Defense Counsel." *Mason*, No. 93-CR-0153, slip op. at 5. The trial court then listed the following evidence that the prosecution could have introduced in rebuttal:

A. That [Mason] had multiple juvenile offenses and was committed to the Ohio Youth Commission as a juvenile (Mitigation Exhibits 2, 4, 11);

B. That as an adult he had been in and out of prison and that while on parole, he committed multiple parole violations (Mitigation Exhibits 6, 7, 11, 12);

C. That [Mason] had been a drug user since age 14 and was also a drug dealer (Mitigation Exhibit 10);

D. [That Mason] engaged in other violent conduct, including threatening his ex-girlfriend with a gun (Mitigation Exhibits 11, 12, Deposition of Dr. Spare);

E. That help was offered to [Mason] at an early age, including counseling, in which he refused to participate (Mitigation Exhibit 3);

F. That he raped Danielle Miller on October 7, 1992 (Dr. Spare deposition);

> G. That during the ten years prior to raping and murdering Robin Dennis, [Mason] had spent all but 19 months in prison, which included his parole being violated on four separate occasions (deposition of Dr. Spare).

Id. at 5-6. The Ohio Supreme Court determined that defense counsel reasonably chose not to present mitigating evidence about Mason's "good character and rehabilitation potential" because they did not want to run the risk of this negative rebuttal evidence. *Mason*, 694 N.E.2d at 956. The state supreme court did not explicitly base its conclusion about defense counsel's strategic motivations on whether state law would have allowed the prosecutor to use all of the negative evidence listed above. *Cf.*, *e.g.*, *State v. Henness*, 679 N.E.2d 685, 698 (Ohio 1997) (limiting a prosecutor's right to "rebut false or incomplete statements regarding the defendant's criminal record . . . to those instances where the defense offers a specific assertion, by a mitigation witness or by defendant, that misrepresents the defendant's prior criminal history"). Because state law governs the scope of rebuttal evidence, we as a federal habeas court will accept the Ohio Supreme Court's interpretation of state law. *See Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001), *cert. denied*, -U.S. -, 122 S. Ct. 1323 (Mar. 18, 2002). However, we observe once again that this reasoning does not apply to mitigating evidence about Mason's background and life history, which trial counsel did not investigate and thus had no opportunity to present at sentencing. Testimony that simply put Mason's childhood into context without

misrepresenting it would not have been subject to the prosecutor's rebuttal evidence, which mostly concerned Mason's character.

c. Inadequate Psychiatric Assistance

Mason argues that he received ineffective assistance of counsel at sentencing because his attorney acceded to inadequate psychiatric assistance. Specifically, he argues that Dr. Spare, the psychiatrist who examined him for the sentencing phase, failed to develop mitigating evidence and should have been disqualified due to a conflict of interest that stemmed from his treatment of Mason's wife. Petitioner's Br. at 33-34 n.8. In *Skaggs*, we held that counsel's use of an incompetent psychiatric expert at sentencing constituted ineffective assistance of counsel. *Skaggs*, 235 F.3d at 273-74. However, the defendant in *Skaggs* was protected by *Ake* because he had claimed insanity as a defense at trial. *Id.* at 264. Mason's defense rested on residual doubt and the argument that Chris had murdered Robin; therefore, Mason was not entitled to psychiatric assistance during the sentencing phase under *Ake*. Moreover, the two cases can be distinguished because defense counsel did not present any expert psychiatric evidence in this case. *Cf. id.* at 267 (holding that defense counsel rendered constitutionally ineffective assistance by "fail[ing] to investigate and present meaningful mitigating evidence" and "us[ing] an incompetent and fraudulent 'psychologist' as the central mitigation witness").

However, according to the record before us, a competent psychiatric expert would have

"conduct[ed] a wide-ranging, very thorough inquiry into Mr. Mason's psychosocial background." Smalldon Aff. at ¶ 12. Such an inquiry would no doubt have ameliorated the prejudicial effects of defense counsel's alleged failure to investigate Mason's life history. Therefore, although Mason was not entitled to psychiatric assistance under *Ake*, he may still have an ineffective assistance claim for the deficient performance of defense counsel in apparently relying on Dr. Spare for an independent investigation into mitigating evidence.

Mason pursued his ineffective assistance of counsel claim with diligence, raising it in all of his pleadings. He has yet to receive his request for an evidentiary hearing. We therefore remand this case to the district court with instructions to hold an evidentiary hearing and to determine, in light of the factors that we have discussed, whether defense counsel rendered constitutionally ineffective assistance with respect to the sentencing phase of Mason's trial.

C. *Brady* Violation

After *Brady v. Maryland*, 373 U.S. 83 (1963), a prosecutor who suppresses evidence that is both favorable to a defendant and "material either to guilt or to punishment" violates due process, "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The *Brady* rule encompasses both exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Favorable evidence is material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different." *Id.* at 682. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" of the trial. *Id.* "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (199).

Mason did not raise a *Brady* claim on direct appeal, but he did raise one as his third ground for relief in his state post-conviction petition. The state trial court found that the *Brady* claim was barred by res judicata. The Ohio Court of Appeals held that "nearly all of the [*Brady*] claims set forth in [Mason's] petition were, or should have been[,] raised on direct appeal from his conviction," and then ruled against Mason on the merits. *Mason*, 1997 WL 317431, at *6. The district court found that Mason was in procedural default on the *Brady* claims, had not shown cause or prejudice, and could not make out a true *Brady* violation. *Mason*, 95 F. Supp. 2d at 758.

In *Coleman v. Mitchell*, 268 F.3d 417 (6th cir. 2001), we reiterated that the application of res judicata under Ohio law "is an adequate and independent state ground justifying foreclosure of constitutional claims in habeas." *Id.* at 427 (citing *Rust v. Zent*, 17 F.3d 155 (6th cir. 1994) and *Riggins v. McMackin*, 935 F.2d 790 (6th Cir. 1991)). However, federal habeas relief is available for constitutional claims defaulted in state court if a

petitioner demonstrates cause and prejudice. *Gray v. Netherland*, 518 U.S. 152, 162 (1996).

Mason attempts to dispute the district court's finding that the *Brady* claims were procedurally defaulted, but his arguments essentially point to cause. First, citing *Amadeo v. Zant*, 486 U.S. 214 (1988), Mason suggests that "the [state's] very act of withholding the evidence in the first place established 'cause' for any alleged procedural default." Petitioner's Br. at 88. Second, he argues that "the fact that the documents were not available until state post-conviction again establishes adequate 'cause' for any alleged default. A petitioner is not required to raise on direct appeal claims for which he lacks a basis in fact, especially where the state has actually concealed the facts." Petitioner's Br. at 88 (internal citation omitted). However, as the district court noted, Mason has not shown why the basis for a *Brady* claim was not available on direct appeal. Conclusory statements about state concealment will not support a finding of cause. *Amadeo*, 486 U.S. at 222 ("[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.") (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Even assuming that Mason did have cause for failing to raise his *Brady* arguments on direct appeal, we are not persuaded that he can show prejudice. To obtain relief, Mason "must convince us that 'there is a reasonable probability' that the result

of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler v. Greene*, 527 U.S. 263, 289 (1999). In examining the suppressed evidence, we must ask "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 290 (quotation omitted). We conclude that we cannot answer this question in the affirmative.

Mason describes three general categories of evidence that was allegedly withheld from his defense: (1) statements made by Robert Rodeffer ("Rodeffer") to police and medical personnel that he had been at Robin's murder; (2) exculpatory statements made by Michael and Carolyn Young, friends of the Dennises, to Captain Al Hayden ("Hayden"), who interviewed them three days before the jury was impaneled, and (3) pretrial statements of various witnesses that were allegedly inconsistent with their testimony at trial. The district court reviewed the record and determined that there was no reasonable probability that the disclosure of these statements would have produced a different result at trial. *Mason*, 95 F. Supp. 2d at 758-60. We agree.

Rodeffer was arrested on February 19, 1993, four days after the discovery of Robin's body, for stealing whiskey from a convenience store. At the time of his arrest, Rodeffer was both intoxicated and suicidal; he had apparently consumed three-quarters of a fifth of whiskey and seven sleeping pills. Soon after making the arrest, the police transported Rodeffer to Marion General Hospital for a medical

evaluation. While being examined, Rodeffer indicated to the arresting officer that he had information about Robin's death, which he intimated was "satanic related." J.A. at 1915. Rodeffer stated that Robin had been ordered to get out of her car, hit in the back of the head, and then "hung by her neck with a large log chain." J.A. at 1923. As the district court noted, this description of Robin's injuries was inconsistent with her actual injuries. *Mason* 95 F. Supp. 2d at 758.

After reviewing Rodeffer's statements and the surrounding circumstances, the district court concluded that "it strains credibility past the breaking point to suggest that there is a reasonable probability Rodeffer's evidence would have produced a different verdict." *Mason*, 95 F. Supp. 2d at 758. Mason contends that the district court's dismissal of Rodeffer's statements amounted to "an impermissible credibility determination that is not supported by the evidence and[,] more importantly, is not a factor properly considered in analyzing a *Brady* violation." Petitioner's Br. at 89. We disagree. *Bagley* instructs courts to remedy a *Brady* violation only if the undisclosed evidence presents a reasonable probability of a different result at trial. *Bagley*, 473 U.S. at 682. It was thus proper for the district court to consider the circumstances of Rodeffer's statements.

Mason also asserts that he suffered prejudice due to the nondisclosure of notes that Hayden took while conducting telephone interviews of the Youngs shortly before Mason's trial began. The district court summarized these notes as follows:

> During Hayden's conversations with the Youngs, both Michael and Carolyn Young indicated that they had moved from Ohio to South Carolina because they were receiving threatening letters and telephone calls from unknown people in connection with the trial. Michael Young told Captain Hayden that when Chris Dennis woke up late in the evening on February 8, 1993, he was angry that Robin Dennis was not there, and said he would kill her when he found her. Carolyn Young said she thought she had seen, several hours after Dennis was last seen alive, the Harley-Davidson T-shirt Dennis was wearing at the time of the murder. Carolyn Young said she thought she had seen Robin Dennis riding in a car on the evening of February 8, 1993, several hours after the prosecution argued that [Mason] killed Dennis. Both Youngs expressed concerns that Chris Dennis might have killed his wife in order to gain the proceeds of her life insurance.

Mason, 95 F. Supp. 2d at 759. Mason contends that these statements were necessary to his defense theory that Chris murdered his wife. The district court's review of the trial transcript, however, resulted in finding that "the record demonstrates conclusively that [Mason] not only had access to, but actually attempted to proffer at trial, every piece of exculpatory evidence he now alleges he was unfairly deprived of by the state's failure to disclose Captain Hayden's telephone conversations with Michael and Carolyn Young." *Id.* at 760. Because the direct and cross-examination of witnesses imparted the

substance of these conversations, the district court concluded that the disclosure of the notes themselves would not have created a reasonable probability of a different verdict. *Id.*

We agree with the district court that Mason was not prejudiced by the nondisclosure of Hayden's notes. Both the Youngs testified at Mason's trial that, on the night of Robin's disappearance, Chris had stated his intention to kill her if he found her. Moreover, defense counsel cross-examined Michael Young about Chris's threats. Carolyn Young also testified on direct and cross-examination about Robin's Harley-Davidson shirts. As for the sighting of Robin on the night of her disappearance, Carolyn Young testified that she believed that she had seen Robin between 9:30 and 10 p.m., but stated that she had not worn her glasses and could not be certain about whether she had actually seen Robin in the car. Chris himself testified on both direct and cross-examination about being the beneficiary of Robin's life insurance policy. In light of the direct and cross-examination of the Youngs, we agree with the district court's conclusion that Hayden's notes do not present a reasonable probability of a different result at trial.

Finally, Mason claims that he suffered prejudice as a result of the prosecution's failure to disclosure pretrial statements of seven witnesses, including the Youngs and Chris. According to Mason, all of these witnesses had seen Robin on the day of her disappearance and all "had given different versions of the facts surrounding the death of Robin Dennis [that] were impeaching as well as

exculpatory and were required to be disclosed by the state." Petitioner's Br. at 85. We are unable to find the existence of any such documents in the record. We also agree with the district court's observation that defense counsel "cross-examined each of the listed witnesses in detail, and frequently used pretrial statements from those witnesses for impeachment purposes." *Mason*, 95 F. Supp. 2d at 760. Because Mason failed to indicate the existence or location of these statements, we conclude that he has been unable to show prejudice from their nondisclosure and that he has failed to overcome his procedural default, precluding him from asserting a *Brady* violation before us.

D. *Miranda* Violation

Since *Miranda v. Arizona*, 384 U.S. 436 (1966), courts have protected a defendant's privilege against self-incrimination by suppressing any statement "stemming from custodial interrogation of the defendant" if the police failed to comply with certain procedural safeguards. *Id.* at 444. At trial, the prosecution introduced statements that Mason had made to the police during interviews on February 10 and 12, 1993. Mason contends that the trial court should have suppressed these statements because they were made while he was in custody and before he received any *Miranda* warnings. The Ohio Supreme Court disagreed, concluding from the circumstances of the February interviews that Mason was not in custody during his interrogation and that he had made the statements voluntarily. *Mason*, 694 N.E.2d at 946. Because the state court correctly invoked *Miranda* in this case, we review its

decision under the "unreasonable application" prong of § 2254(d)(1), specifically whether its application of the legal principles was "objectively unreasonable." *Williams*, 529 U.S. at 409. We must presume that the state court's factual findings are correct unless Mason offers clear and convincing evidence to rebut this presumption. 28 U.S.C. § 2254(e)(1).

The *Miranda* Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. A suspect is "in custody" for purposes of receiving *Miranda* protection is there has been a "formal arrest or restraint on freedom of movement." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam). *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

In this case, Potts questioned Mason twice about Robin's disappearance. The first interrogation,

which took place in the early afternoon of February 10, 1993, at the Sheriff's Office, was recorded on audiotape and lasted eighteen minutes. At the hearing on Mason's motion to suppress the statements made at this interrogation and the interrogation that followed, Potts described Mason as "real cooperative" and testified that Mason told him "to come back by" if he needed anything else. J.A. at 430, 460. Mason agreed that he made a "voluntary choice" to answer Potts's questions about Robin. J.A. at 506.

The second interrogation took place on February 12, 1993, in an interrogation room located in the basement of City Hall. This interview was also recorded, but it lasted for almost four hours. Mason was not formally arrested or told that he could not leave. He asked whether he was under arrest sometime after 4:03 p.m. and was told that he was not. Mason later testified that his mobility was hampered by being questioned in the basement. He also testified that he asked the police to take him back home and to terminate the interview.[14] However, he acknowledged on cross-examination that he could have gotten out of the interrogation room. After this interview, Mason's parole officer took Mason into custody for violating the conditions of his parole. Potts then gave Mason his *Miranda* warnings. The interview ended when Mason refused to waive his *Miranda* rights and requested a lawyer.

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[14] Mason also indicated that he had to leave in order to pay a utility bill.

Mason argues that he was in custody during the interviews of February 10 and 12 and that his statements to the police should consequently not have been admitted at trial. Mason points to the following factors: (1) he was the sole suspect in the investigation; (2) he was transported by car to the police station for questioning,[15] "precluding his ability to leave without the officers[']' permission and willingness to drive him home"; (3) he was questioned at the police station and "interrogated for four hours (in an increasingly hostile setting)"; (4) he was "lied to by the officers regarding eyewitnesses[']' placing Mason at the crime scene"; (5) he was "repeatedly told he was not under arrest even though his parole officer stood ready to immediately arrest him as soon as the interrogation ceased"; and (6) he was arrested for a parole violation after the February 12 interrogation. Petitioner's Br. at 95-96.

However, we agree with the State of Ohio that these circumstances do not demonstrate the functional equivalent of an arrest. Mason's first argument is unavailing. *See Stansbury*, 511 U.S. at 319 ("[A]n officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody."). We deem the mode in which Mason was transported for questioning to be irrelevant, because Mason himself admits that he "voluntarily came to the police station twice."

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[15] Mason notes that Potts drove him from his home to the Sheriff's Office in an unmarked police car with doors that could not be unlocked by passengers.

Petitioner's Br. at 113. The fact that Mason was questioned in a "coercive environment" such as a police station does not necessarily constitute custodial interrogation. *Mathiason*, 429 U.S. at 495; *United States v. Salvo*, 133 F. 3d 943, 948 (6th Cir.), *cert. denied*, 523 U.S. 1122 (1998). *Miranda* requires a significant deprivation of freedom. The possibility that Mason may not have been aware of the consequences of his participation in the interview does not mean that he was in custody. *See Beheler*, 463 U.S. at 1125 n.3. Mason was repeatedly told that he was free to leave when he wished. The state courts concluded that Mason was not in custody at the time of questioning because he was not under arrest and he voluntarily agreed to answer the police's questions. Mason has not demonstrated that this determination was an unreasonable application of federal constitutional law to the facts of his case. We thus deny Mason habeas corpus relief with respect to this claim.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478. The Ohio courts found that Mason's statements were voluntary. *Mason*, 694 N.E.2d at 946. Because Mason has not presented clear and convincing evidence to the contrary, we defer to the state courts' factual finding and hold that their application of *Miranda* was not objectively unreasonable.

E. Right to Confront Witnesses and to Present a Defense

Mason argues that the trial court violated his right to confront the prosecution's witnesses and to

present a defense by restricting cross-examination of Chris, who had a history of violent assaults on Robin and others. Mason asserts that the Ohio Supreme Court's decision to uphold the trial court's exclusion of this evidence was an unreasonable application of the following principles from *Washington v. Texas*, 388 U.S. 14 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19. The State of Ohio does not dispute that a defendant may offer evidence to show that a third party committed the crime, but it contends that rules of procedure and evidence constrain the right to present evidence. Mason claims that his right to a fair trial should control.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Supreme Court proclaimed that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302. The right to present witnesses, however, is not absolute. "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed

to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* Mason does not argue that the Ohio rule barring evidence of prior bad acts is unfair and unreliable. Instead, Mason contends that this rule's protection should extend to defendants but not to witnesses. We are not persuaded that any such proposition is clearly established federal law as determined by the Supreme Court, and therefore decline to grant habeas relief on this ground.

Mason also argues that evidence of Chris's violent tendencies was admissible to show his bias or motive in testifying for the prosecution. The Supreme Court has recognized a defendant's constitutional right to test the credibility of witnesses through cross-examination. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *see also Chambers*, 410 U.S. at 295. Forbidding inquiry into a witness's bias can violate the Confrontation Clause. *Delaware v. Van Arsdall*, 475 U.S. 673, 679-80 (1986). However, a trial court retains discretion to limit the scope of cross-examination, based on concerns such as "harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679. In short, the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

In this case, Mason's defense at trial was that Chris had murdered Robin. It was thus in Mason's interest to demonstrate Chris's bias and motive for

testifying against Mason. Mason was allowed to present evidence of and to cross-examine Chris about Chris's heavy drinking and violent tendencies, including two incidents of wife-beating. *See Mason*, 95 F. Supp. 2d at 779. The trial court also permitted defense counsel to present evidence of and to cross-examine Chris about an alleged threat to kill Robin on the day that she disappeared. The jury also learned on both direct and cross-examination of Chris that Robin had made him the beneficiary of her life insurance policy. However, the trial court ruled that evidence about Chris's history of assaults was inadmissible because it was proffered by Mason only for the purpose of showing that Chris acted in conformity with the prior acts and was therefore likely to have murdered Robin.

Mason's first Confrontation Clause argument appears to have been that the evidence should be admitted to prove identity. Defense counsel alleged that Chris had previously beaten a person and "left [that person] for dead in a field," J.A. at 758, just as Robin was left in an abandoned rural area. However, he also argued in the alternative that Chris's violent acts should be admitted "not as specific instances to impeach credibility, but to show possibility of intent, motive, [and] similar modus operandi." J.A. at 758-59. Finally, defense counsel wanted to impeach Chris's credibility by showing "other inconsistencies and what we believe to be untruths and/or lies." J.A. at 759; *see also* J.A. at 785 (contending during opening argument that "Chris Dennis has lied about certain aspects of this case from the very beginning"). *But see* J.A. at 1593 (arguing, in Mason's brief to the Ohio Supreme

Court, that "[t]he jury was not being asked to consider this evidence as impeaching").

Neither the Ohio Supreme Court nor the district court examined Mason's Confrontation Clause claim as such, holding instead that the evidence was not admissible under Ohio Rule of Evidence 404(A), which bars the use of propensity to prove conduct. The Ohio Supreme Court first rejected Mason's argument that Rule 404 should not apply to Chris because he was a witness rather than a defendant on trial. *Mason*, 694 N.E.2d at 950. It then observed that the trial court had allowed Mason "to present some evidence that tended to show the criminal propensity of Chris Dennis," including testimony about two incidents when Chris struck Robin in the face. *Id.*

We recently considered the Confrontation Clause in *Boggs v. Collins*, 226 F.3d 728 (6th Cir. 2000), *cert. denied*, 532 U.S. 913 (2001). Although that case was decided under pre-AEDPA standards, it is still instructive. The *Boggs* court noted that courts had found Confrontation Clause violations when defense counsel had advanced "an articulated theory that a witness had a motive to fabricate." *Id.* at 741. The record in this case, to the extent that Mason's attorneys based the defense on residual doubt, only barely suggests that they pursued a bias theory at trial. The trial court consistently framed the question as one of propensity, and defense counsel did not suggest otherwise. We thus conclude that Mason has failed to show that the Ohio Supreme Court unreasonably applied clearly established Supreme Court precedent in upholding

the trial court's exclusion of certain evidence of Chris's violence.

F. Prosecutorial Misconduct

Mason argues that "[t]hroughout the trial and penalty phases, the prosecutor engaged in egregious misconduct designed to prejudice Mason and to inflame the passions of the jury, thus depriving Mason of due process and a fair trial." Petitioner's Br. at 108. The relevant question in cases of alleged prosecutorial misconduct is "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "[T]he misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant." *Simpson v. Jones*, 238 F.3d 399, 409 (6h Cir. 2000) internal quotation marks and citation omitted). A claimant must establish that the challenged statement was both improper and so flagrant as to require reversal. *Boyle v. Million*, 201 F.3d 711, 717 (6th cir. 2000). We have previously identified four factors that are relevant in analyzing a claim of prosecutorial misconduct:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive, whether they were deliberately or accidentally placed before the jury[;] and the strength of

> the competent proof to establish the guilt of the accused.

Hill v. Brigano, 199 F.3d 833, 847 (6th Cir. 1999) (quotation omitted). We review a prosecutorial misconduct claim for harmless error. *Id.*

We first note our previous holding "that Ohio's contemporaneous objection rule constitutes an adequate and independent state ground that bars federal habeas review absent a showing of cause and prejudice." *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001). "Moreover, we view a state appellate court's review for plain error as the enforcement of a procedural default." *Id.* "In determining whether state courts have relied on a procedural rule to bar review of a claim, we look to the last reasoned opinion of the state courts and presume that later courts enforced the bar instead of rejecting the defaulted claim on its merits." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)).

Mason presented numerous claims of prosecutorial misconduct to the district court, which found them to be procedurally barred. *Mason*, 95 F. Supp. 2d at 779-85. Defense counsel failed to make contemporaneous objections to most of the alleged instances of prosecutorial misconduct. Therefore, in the last reasoned opinion by a state court reviewing these claims, the Ohio Supreme Court expressly enforced Ohio's contemporaneous objection rule and reviewed for plain error. *Mason*, 694 N.E.2d at 951.

Defense counsel did object to a question about DNA testing. Addressing this claim on the merits, the Ohio Supreme Court held that the prosecutor

had not acted improperly. *Mason*, 694 N.E.2d at 951. Mason has thus waived the right to federal habeas review on all but one of his prosecutorial misconduct claims unless he can demonstrate cause and prejudice or make "a showing of a fundamental miscarriage of justice." *Hinkle*, 271 F.3d at 245 (quoting *Simpson*, 238 F.3d at 406).

Mason argues that "the prosecutor engaged in ongoing misconduct" during cross-examination by "attacking counsel's defense strategies[,] over which Mason had no control." Petitioner's Br. at 110. One of the prosecutor's questions concerned Mason's extramarital relationship with Robin: "Is that the same reason that when this case started, in order to contest the DNA results, you had your attorneys do independent testing to see if our DNA results were right?" J.A. at 1092. Defense counsel raised an objection, which the trial court overruled. We agree with the district court that this question was not improper. The credibility of a criminal defendant who testifies may be impeached like that of any other witness. *Greer*, 264 F.3d at 683. The question about Mason's reason for conducting independent DNA testing followed his testimony about a statement to the police in which he denied knowing Robin or ever being alone with her.

The prosecutor was thus impeaching Mason by showing inconsistencies between his pretrial statement to the police and his testimony at trial.

Mason argues on appeal that another question, pertaining to his failure to produce records that showed his employment at the local festival where he met Robin, demonstrates misconduct, as do

the prosecutor's "ridicul[ing] each of the defense theories" during his closing argument for the liability phase, Petitioner's Br. at 111, and his closing argument for the penalty phase. We first note that defense counsel made no contemporaneous objections. The Ohio Supreme Court reviewed for plain error, *Mason*, 694 N.E.2d at 951, thus barring federal habeas review absent a showing of cause and prejudice. We are not persuaded that Mason has shown cause and prejudice to excuse the procedural default and therefore deny habeas relief with respect to this claim.

G. Juror Bias/Misconduct

The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726 (1992). Under clearly established Supreme Court precedent, a defendant who alleges implied juror bias is entitled to a hearing in which he has "the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982); *Dennis v. United States*, 339 U.S. 162, 171-72 (1950). However, pursuant to Ohio Rule of Evidence 606(B), evidence of statements made during the course of jury deliberations is not admissible, a rule in keeping with the general theory that jurors are incompetent witnesses of their own misconduct. A juror may testify about "extraneous prejudicial information" or "outside influence." *Id.* We recently held that the Ohio courts' application of this statute to dispose of biased jury claims violated clearly established Supreme Court precedent that recognizes the fundamental importance of a defendant's

constitutional right to a fair trial. *Doan v. Brigano*, 237 F.3d 722, 732 (6th Cir. 2001). In *Doan*, we concluded that a juror's presentation of an out-of-court experiment to other jurors was constitutional error, but that this error was harmless. *Id.* at 739.

In this case, Mason alleges that juror bias or misconduct resulted when various jurors (1) made racial slurs, (2) presumed Mason's guilt, (3) slept during trial, and (4) conducted and then presented an out-of-court investigation. The first three involve internal influences, and under *Tanner v. United States*, 483 U.S. 107 (1987), testimony on those subjects should have been barred by the evidentiary rule prohibiting juror impeachment of a jury verdict. *Id.* at 121; *cf. United States v. Logan*, 250 F.3d 350, 380 n.2 (6th Cir.) (recognizing the difference in how the *Doan* and *Logan* panels framed the issue), *cert. denied*, 534 U.S. 895 (2001). However, under *Doan*, the question is whether Mason received a fair trial. Mason did have an opportunity to prove actual bias when the trial court heard oral arguments on his motion for a new trial. The trial court denied the motion, finding that the jurors' conduct did not impair Mason's ability to receive a fair trial. We must presume that the trial court's factual determinations are correct unless rebuts that presumption with clear and convincing evidence.

1. Racial Slurs

Mason argues that he was denied a fair trial because of the racial prejudice of an all-white jury, which manifested itself through generalizations

about race[16] and the use of black slang.[17] Individual jurors were disturbed by the racist comments but apparently did not understand that they could do anything about it. After reviewing the affidavits of all twelve jurors[18] and hearing testimony from the court bailiff, three jurors, and an alternate juror, the trial court found that "[a]t no time during the trial did any of the jurors participate in any acts of racism which could have impaired [Mason's] ability to receive a fair trial." J.A. at 1487.

The question on habeas is whether Mason can rebut the presumption that the state court's factual findings are correct. Alternate juror Mary Beckholt ("Beckholt") testified that the racist comments, in her opinion, could have violated Mason's right to a fair trial: "I felt it was unfair. I felt it was wrong, and I felt that people were making – if there were judging – making judgmental comments of that sort,

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[16] Alternate juror Mary Beckholt testified to jurors' comments during the trial that "all black people did was drink and party and do beer runs." J.A. at 1384.

[17] Mason apparently wears a "dew rag" or bandana on a daily basis. J.A. at 773. Juror Kathy Haney testified that a juror made "racist remarks and [talked] in a jive manner" about "dew rags," as well as ridiculed Mason's speech. J.A. at 1412-13. Juror Jason Mahaffey ("Mahaffey") testified that the same juror had "said he had to go get his dew rag, cause he doesn't have a hat; he just has a dew rag." J.A. at 1407-08. However, Mahaffey did not characterize the comments as "racial." J.A. at 1407.

[18] The prosecutor and defense counsel obtained these affidavits without consulting the trial court. The joint appendix contains the affidavits of ten jurors who denied participating in or observing any racism.

how could they fairly judge the case?" J.A. at 1401. Beckholt, however, did not participate in the jury's deliberations. Because Mason does not offer any evidence other than that which the trial court had at the time it made its factual finding, we deny habeas relief with respect to this claim.

2. Presumption of Guilt

Mason alleges that juror Russell L. Dennis expressed belief in Mason's guilt before formal deliberations began. When questioned about such a statement, the juror acknowledged saying, "Maybe he's pleading guilty," J.A. at 1378, but testified that he "really . . . hadn't formed an opinion. It was just wishful thinking because it was late in the day and everybody was tired." J.A. at 1380. The trial court found "no substantial evidence that any juror made any comment during the trial which demonstrated that he or she had failed to keep an open mind so as to be able to fairly decide the evidence in this case." J.A. at 1487. Absent clear and convincing evidence to the contrary, we must defer to the state court's factual finding, and therefore deny habeas relief with respect to this claim.

3. Sleeping During Trial

Mason alleges that juror Wanda Straub ("Straub") fell asleep during the trial. The record is unclear as to whether the juror slept during proceedings in the courtroom or during breaks in the jury room. However, Straub averred that she "was awake and attentive during all proceedings of the trial." J.A. at 1479 (Straub Aff. at ¶ 2). The trial court made the same finding with respect to all

twelve jurors. Absent clear and convincing evidence to the contrary, we must defer to the state court's factual finding, and therefore deny habeas relief with respect to this claim.

4. Extrinsic Evidence

This case involves an out-of-court investigation similar to the one in *Doan*, in which a juror put lipstick on her arm to simulate a bruise and then determined that such a bruise could be seen in a darkened room. *Doan*, 237 F.3d at 727. In this case, juror Mary Downs ("Downs") disassembled her husband's revolver to see whether the grip looked like the one shown in court. The juror stated that she conducted this experiment and informed other jurors after the jury had returned a guilty verdict. However, Beckholt, who did not participate in the jury's deliberations, testified that Downs reported her results during the trial. The trial court found that Downs's actions "did not influence the verdict in this case and as such, [Mason] was not prejudiced by this conduct." J.A. at 1487-88.

We review constitutional errors at trial such as Sixth Amendment violations under a harmless error standard. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Doan*, 237 F.3d at 736. The habeas petitioner must show that the trial error "had substantial and injurious effect or influence in determining the jury's verdict." *Doan*, 237 F.3d at 736 (quoting *Brecht*, 507 U.S. at 637). Although Downs's presentation of her out-of-court findings may have been constitutional error, Mason cannot demonstrate that it substantially affected or influenced the jury's verdict. The evidence at trial

was more extensive than the gun grip that was the subject of Downs's experiment; in fact, the alleged murder weapon was the wooden board with nails attached to it. We therefore deny habeas relief with respect to this claim.

H. Sentencing Phase Instructions

Mason claims that the trial court's instructions to the jury led to "an unreliable sentencing determination." Petitioner's Br. at 135. Specifically, he argues that the trial court committed constitutional error by (1) failing to define "mitigation" or "mitigating factor," (2) refusing to instruct the jury on residual doubt, and (3) failing to remove the death sentence from an allegedly deadlocked jury. "On habeas review, errors on instructions are not reviewable unless they deprive a defendant of constitutional due process." *Gall v. Parker*, 231 F.3d 265, 321 (6th Cir. 2000), *cert. denied*, 533 U.S. 941. The question before us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

1. Failure to Define Mitigation

Mason complains that the trial court failed to explain the meaning of "mitigation" or "mitigating factor," leaving the jury "to speculate throughout the trial as to what it was they were supposed to be considering." Petitioner's Br. at 135. We note as an initial matter that, contrary to Mason's claims, the Supreme Court precedent that existed prior to

Mason's conviction did not clearly establish a defendant's due process right to a jury instruction on the definition of mitigation.[19] Mason's reliance on *Coker v. Georgia*, 433 U.S. 584 (1977), is unavailing. Although the trial court in that case did define "mitigating circumstances" as "circumstances not constituting justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or punishment," *id.* at 590-91 (internal quotation marks omitted), the question before the Supreme Court was whether a sentence of

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[19] Under *Buchanan v. Angelone*, 522 U.S. 269 (1998), the standard for reviewing jury instructions from the selection phase of a capital sentencing process is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 276 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). The Supreme Court has thus held that the Eighth and Fourteenth Amendments do not require a trial court to give a specific instruction on mitigating evidence, much less define what it means. *Id.* at 277 (holding that a jury instruction to base the decision on "all the evidence" was constitutionally sufficient because it "afforded jurors an opportunity to consider mitigating evidence"). The only constitutional requirement is that the instructions do not preclude a capital jury from considering mitigating evidence. *Id.* at 276; *see also Weeks v. Angelone*, 528 U.S. 225, 232 (2000).

We note that the instruction challenged in this case complied with the *Buchanan* mandate that a trial court should not restrict a jury's consideration of mitigating evidence. However, *Buchanan* is not controlling because it was decided three and a half years after Mason's conviction, and, under AEDPA, Supreme Court precedent must be in existence prior to a conviction to control a habeas court's analysis. *See Williams*, 260 F.3d at 703.

death for the crime of rape was cruel and unusual punishment prohibited by the Eighth Amendment. *Id.* at 586. Indeed, the trial court gave the instruction pursuant to state statute. *Id.* at 589. *Coker* therefore provides no support for the due process claim that Mason must successfully make for us to review a challenged jury instruction.

Mason also contends that "the jury's discretion was not sufficiently guided under *Gregg v. Georgia*, 428 U.S. 153 (1976)." Petitioner's Br. at 137. *Gregg*, however, simply recommended that juries in death penalty cases be "apprised of the information relevant to the imposition of [the death] sentence and provided with standards to guide its use of the information." *Gregg*, 428 U.S. at 195. The trial court provided such guidance in this case; it instructed the jury of its duty to weigh aggravating circumstances against mitigating factors, the latter "including, but not limited to, the nature and circumstances of the offense and the history, character, and background of the Defendant, and any other factors that are relevant to the issue of whether the Defendant should be sentenced to death." J.A. at 1288. We agree with the Ohio Supreme Court that "the instructions, considered as a whole, adequately guided the jury and did not restrict its consideration of mitigating evidence." *Mason*, 694 N.E.2d at 953. We therefore deny habeas relief with respect to this claim.

2. Failure to Instruct on Residual Doubt

Mason argues that he was denied due process by the trial court's refusal to give a proposed instruction on residual doubt. In *Franklin v.*

Lynaugh, 487 U.S. 164 (1988), a majority of the Supreme Court agreed that capital defendants do not have a constitutional right to demand jury consideration of residual doubt during the sentencing phase. *Id.* at 173 & n.6 (plurality opinion); *id.* at 187-88 (O'Connor, J., concurring in the judgment); *see also Penry v. Lynaugh*, 492 U.S. 302, 320 (1989). Because Supreme Court precedent clearly establishes that Mason cannot support his residual doubt argument, we deny habeas relief with respect to this claim.

3. Failure to Remove the Death Sentence from the Jury

In *Allen v. United States*, 164 U.S. 492 (1896), the Supreme Court held that the trial court did not err in giving a supplemental instruction to a deadlocked jury. *Id.* at 501. The constitutionality of an *Allen* charge, sometimes referred to as a "dynamite" charge, turns on whether the charge in question was "coercive." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988).[20] An *Allen* charge must be

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[20] In *Lowenfield*, the jury requested additional instructions after it became unable to reach a decision on the second day of deliberations. 484 U.S. at 234. The trial court then asked the individual jurors to answer in writing whether "further deliberations would be helpful in obtaining a verdict." *Id.* Eight jurors responded in the affirmative. *Id.* After denying a defense motion for a mistrial, the trial court directed the jury to return to the courtroom for further instructions. *Id.* At this time, the jury gave the trial court a new note that stated that some of the jurors had misunderstood his original question. *Id.* The trial court polled the individual jurors again, but asked whether they felt that "any further deliberations will enable you to arrive at a verdict?" *Id.* Eleven jurors responded in the

reviewed "in its context and under all the circumstances." *Id.* at 237 (quoting *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam)). Mason argues that the trial court's supplemental instruction to the jury during its deliberations at the penalty phase of the trial was an improper *Allen* charge.

The trial court gave the following preliminary instruction to the jury:

> You shall recommend the sentence of death if you unanimously, all twelve jurors, find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you shall unanimously, all twelve, recommend either a life sentence with parole eligibility after serving twenty years of imprisonment or a life sentence with parole eligibility after serving thirty years of imprisonment.

J.A. at 1290. The trial court then read the three verdict forms that the jury would consider, with the express instruction that the jury not attach significance to the order in which the forms were read. The first verdict form recommended a death sentence, the second recommended a life sentence

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affirmative. *Id.* at 235. The trial court then gave the jury an *Allen* charge. *Id.* Thirty minutes later, the jury returned a sentence of death. *Id.* The Supreme Court held that the polling of the jury and the supplemental instruction were not coercive as to violate the petitioner's constitutional rights. *Id.* at 241.

with parole eligibility after twenty years, and the third recommended a life sentence with parole eligibility after thirty years. The jury began its deliberation in the penalty phase of the trial at 3:50 p.m. on Monday, June 27, 1994, and broke for the evening at 5:05 p.m. The jury returned to the courthouse to continue deliberations at 8:45 a.m. on Tuesday, June 28, 1994. After a lunch break from 12:00 noon to 1:30 p.m., the jury informed the trial court that it was "unable to reach a unanimous decision on any one of the sentencing options." J.A. at 1311. After giving the jury a standard *Allen* charge, the trial court engaged in the following colloquy with the jury foreman:

> The Court: Is there a possibility, Mr. McGuire, that after an additional period of time you may reach an agreement? And this instruction that I have give you, and considering that with the rest of the instructions?
>
> Mr. McGuire: No.
>
> The Court: Would you wish to return to the jury room and discuss it, this instruction, with the jurors and then return and respond to that question?
>
> Mr. McGuire: Yes.
>
> The Court: Take the jury, please

J.A. at 1313-14. Defense counsel objected to the supplemental instruction. The jury continued to deliberate until 5:15 p.m., when it broke for the

evening. The jury returned to its deliberations at 8:35 a.m. on Wednesday, June 29, 1994. After fifteen minutes, the jury returned a unanimous recommendation that Mason be sentenced to death. The trial court then polled the jury, and each juror indicated agreement with that sentence.

Mason argues that the trial court's *Allen* charged forced a deadlocked jury to continue deliberations, in violation of his constitutional rights and contrary to Ohio law. The State of Ohio claims that the *Allen* charge was not unduly coercive. Furthermore, it contends that Ohio law did not preclude the supplemental instruction and that any violation of state law could not properly be raised in a habeas petition.

In evaluating the *Allen* charge, the Ohio Supreme Court first turned to *State v. Springer*, 586 N.E.2d 96 (Ohio 1992), which requires a trial court to impose an appropriate life sentence in the event of an "irreconcilably deadlocked" jury. *Id.* at 100. The state supreme court explained:

> No exact line can be drawn as to how long a jury must deliberate in the penalty phase before a trial court should instruct the jury to limit itself to the life sentence options or take the case away from the jury, as done in *Springer*. Each case must be decided based upon the particular circumstances. Here, after only four and one-half hours of deliberations, the trial court acted appropriately by giving a modified *Howard* charge [itself a modified *Allen* charge]. The circumstances show that the jury was not

> irreconcilably deadlocked, and the modified *Howard* charge did not coerce a death verdict.

Mason, 694 N.E.2d at 955.[21] The Ohio Supreme Court then reiterated its approval of "using supplemental instructions urging jurors to continue deliberations to try to reach a unanimous penalty verdict" and specifically stated that such instructions in a death penalty case would not violate due process. *Id.* (citing *Lowenfield*). Noting that *Lowenfield* "expressly approved the use of *Allen* charges in capital cases," the district court concluded that the trial court did not err in giving "a single *Allen* charge." *Mason*, 95 F. Supp. 2d at 772.

Under AEDPA, the scope of our review is limited to determining whether a state court's decisions are "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Because

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[21] In *State v. Howard*, 537 N.E.2d 188 (Ohio 1989), the Ohio Supreme Court strongly criticized the "traditional" *Allen* charge for placing such emphasis on the jury's reaching a decision. *Id.* at 192. According to the *Howard* court, a traditional *Allen* charge essentially pressures dissenting jurors to change their minds and thus "subtly changes the requirement that the jury verdict by unanimous to one more closely resembling majority rule." *Id.* The Ohio Supreme Court thus proposed a supplemental instruction that it believed would result in the "evenhanded treatment of all jurors." *Id.* at 194. Much of the supplemental instruction in this case follows the proposed *Howard* charge verbatim. Indeed, the trial court scrupulously maintained its neutrality by addressing the jurors as "jurors." J.A. at 1313, rather than distinguishing between "[j]urors for acquittal" and "jurors for conviction," as the *Howard* court had done. *Howard*, 537 N.E.2d at 195.

violations of state law are not within our purview, we will review Mason's *Allen* claim only to determine whether the trial court's supplemental instruction was coercive "in its context and under all the circumstances." *Jenkins*, 380 U.S. at 446. We hold that the *Allen* charge was not so coercive as to deny Mason his due process rights.

As a preliminary matter, we agree with the Ohio Supreme Court that the jury was not "irreconcilably deadlocked." *Mason*, 694 N.E.2d at 955. The jurors in this case simply stated that they were "unable to reach a unanimous decision on any one of the sentencing options," J.A. at 1311, and the trial court then gave the *Allen* charge. Although the foreperson initially dismissed the possibility of a unanimous agreement, we note that his subsequent discussion of the supplemental instruction with the jury was followed by almost four more hours of jury deliberation instead of his return to the trial court with a confirmation of the jury's inability to reach a unanimous decision. This fact persuades us that the trial court did not err in giving an *Allen* charge.

We also believe that the jury was not coerced into returning a unanimous death sentence. First, the trial court's instructions did not require the jury to reject the death penalty unanimously before considering the life sentences. Indeed, the context of the jury's note – which indicated lack of unanimity "on any one of the sentencing options," J.A. at 1311 – strongly suggests that the jury discussed the three possible verdicts at the same time. Moreover, the trial court did not instruct the jury to continue deliberations, but to discuss whether it could do so.

Finally, the jury deliberated for more than three hours after the trial court gave the *Allen* charge. The *Lowenfield* jury deliberated for only thirty more minutes. Given these circumstances, we conclude that the trial court's supplemental instruction was not impermissibly coercive. We therefore deny habeas relief with respect to this claim.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of Mason's petition for a writ of habeas corpus with respect to his conviction but **REMAND** the case for an evidentiary hearing regarding the claim of ineffective assistance of counsel at sentencing and for further proceedings consistent with this opinion.

DISSENT

BOGGS, Circuit Judge, dissenting in part. I largely agree with the court's analysis of Mason's arguments in this case. I cannot agree, however, with the court's decision to remand this action to the district court for an evidentiary hearing on the adequacy of Mason's counsel's investigation and presentation of evidence in mitigation during the sentencing phase of Mason's trial. The court's action both ignores the clear Supreme Court precedent establishing the standards for evaluating the constitutionally required effectiveness of defense counsel and contravenes the statutory limitations on our review of state convictions through habeas corpus proceedings. Accordingly, I respectfully

dissent from the court's decision to reverse the district court's denial of Mason's petition for a writ of habeas corpus and to remand for an evidentiary hearing on further mitigatory evidence that defense counsel could have offered.

This court has reversed capital sentences for failure to present or to investigate mitigatory evidence on no fewer than seven occasions. *See, e.g.*, *Coleman v. Mitchell*, 268 F.3d 417, 438 (6th Cir. 2001); *Greer v. Mitchell*, 264 F.3d 663 (6th cir. 2001); *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *rev'd*, 122 S. Ct. 1843 (2002); *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2001); *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997); *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995). The Supreme Court, in the course of reversing one such decision of this court, has made abundantly clear the extremely high standard that must be met for counsel's representation in the penalty phase to be considered constitutionally inadequate. The Supreme Court in *Bell v. Cone*, 122 S. Ct. 1843 (2002), reversed one iteration of this court's finding of inadequacy of counsel during the penalty phase. In our *Cone* decision, this court observed that counsel's presentation was not only poor, but a complete abdication of the defense attorney's role: "It is indisputable that Cone's trial attorney presented no mitigating evidence at all and made no final argument; he did not even ask the jury to spare his client's life." *Cone v. Bell*, 243 F.3d 961, 978 (6th Cir. 2001) (Ryan, J.). In *Cone*, defense counsel failed to call a single witness to present mitigatory evidence and offered no closing statement, although defense counsel did briefly cross-examine some of the

state's witnesses. *Cone*, 122 S. Ct. at 1848. Nevertheless, the Supreme Court, with only one dissent, held that defense counsel's representation during the penalty phase was not unconstitutionally inadequate under its standard in *Strickland v. Washington*, 466 U.S. 866 (1984).

Determining the best tactic for a penalty-phase presentation is extremely difficult in the wake of a jury's finding the defendant guilty of a horribly brutal act, according to the Court. *Cone*, 122 S.Ct. at 1852. This court's determination that a defense counsel's failure to present *any* affirmative case for mitigation in the penalty phase was unconstitutional ineffective representation failed to indulge the "'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that the particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Id.* at 1854. *See also Strickland*, 466 U.S. at 889.

In this case, defense counsel presented a significantly more robust mitigatory case than the counsel in *Cone*. Defense counsel called two members of the sheriff's department to comment on Mason's good behavior as a prisoner. Counsel also called Mason's mother, his two brothers, his cousin, and finally his wife to testify regarding how meaningful Mason had been in their lives and to ask the jury to spare the defendant's life. Finally, Mason himself testified about the artwork and poetry he had composed in prison. Unlike defense counsel in *Cone*, Mason's counsel delivered an extensive closing statement.

Defense counsel's presentation in the penalty phase is not the principal thrust of the court's concern regarding the adequacy of Mason's representation. Instead, the court contends that defense counsel did not sufficiently investigate Mason's "history, character, or background." According to the court, any investigation would have revealed Mason's traumatic childhood, his living with parents who were drug dealers and users, the regular beatings that he received from his father, and the resulting drug addiction that Mason himself developed from the age of eleven. The court suggests that counsel's failure to present this tale of woe to the jury was not the result of a strategic choice in the heat of litigation, but a lack of knowledge regarding Mason's background. The court argues that, "[h]ad trial counsel conducted an adequate investigation, the jury *would have* heard substantial evidence about how drug use and violence pervaded Mason's background and life history." Slip op. at 21. (emphasis added). Indeed, the court notes Mason's post-conviction testimony that he did not recall defense counsel ever interviewing him regarding his background, much less that of any of his family members. Slip op. at 20-21.

The existing record in this case contradicts the court's finding that defense counsel had no knowledge of these particularly tragic features of Mason's background. As the court indicated, defense counsel was provided with the services of Dr. Robert T. Spare, a psychologist who examined the defendant to determine, among other things, his future dangerousness. Spare also took an relatively extensive oral history from Mason. Under deposition

questioning by defense counsel, Spare recounted essentially all of the facts that, according to this court, were not discovered by defense counsel.[1] Spare testified that Mason told him that his family life was "rather unusual," with his parents involved in "drug related activities as long as he could remember." *See* Videotape Deposition of Dr. Robert T. Spare at 5:57 P.M. According to Spare, Mason began extensive involvement in his parents' drug business in "the middle elementary grades" and started using drugs regularly "about the same time." *Id.* at 5:58 P.M. Spare also testified that Mason said that he had been regularly beaten by his father. *Ibid.*

Spare further testified as to several "exhibits offered for mitigation purposes" that he had reviewed in the course of his treatment of Mason. These exhibits were in the record of the deposition and included several reports from social services agencies that included extensive records of domestic and child abuse in Mason's home and the drug-seeking activities of Mason's parents. The defendant was present during the deposition, *id.* at 5:51 P.M., and thus would have been able to advise his attorney of any additional material that might been relevant. In any event, the deposition shows that Dr. Spare was

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[1] The deposition was conducted during the guilt phase of the trial in anticipation of Dr. Spare's potential absence for a possible penalty phase. The actual video tape of the deposition of Dr. Spare is in our record, as record entry 43 in the district court, referenced as Appendix Vol. 14 to the return of writ by the respondent, record entry 29. The volume number appears to be that assigned in the state trial court.

aware of, and fully related to counsel, the gist of the material on Mason's background as to which the court now appears to be uncertain.

In short, Spare's deposition explicitly covers all of the information to which defense counsel was allegedly not exposed due to shoddy investigation into mitigation evidence. Accordingly, this case seems indistinguishable from prior cases in which we have denied claims of ineffective assistance based on alleged failure to investigate mitigating evidence. Specifically, the defendant had identified no evidence of which defense counsel was not already aware at the time of the penalty phase proceedings. *See Buell v. Mitchell*, 274 F.3d 337, 361 (6th Cir. 2001).

The relevant question is the one that this court declines today to answer, whether defendant counsel's decision not to present certain evidence of the drug-related activities of Mason's parents, of Mason's long history of drug use, and of the physical abuse to which Mason was subjected, was a reasonable strategic choice of counsel or was within the wide range of decisions that constitute constitutionally effective representation.

I believe that counsel's decision not to present evidence of Mason's childhood was reasonable or that, at the very least, the Ohio Supreme Court's denial of Mason's claim was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 866 (1984), as it must be for this court to overturn its decision. *See* 28 U.S.C. § 2254(d)(1). The court assumes that any defense counsel who would not have presented the details of Mason's past to the jury would have been either indifferent to his client's fate

or incompetent. As the court states: "Had trial counsel conducted an adequate investigation, the jury *would have* heard substantial evidence about how drug use and violence pervaded Mason's background and life history." Slip op. at 21.

To me, the record is clear that defense counsel not only was aware of Mason's background, but also made a reasonable strategic decision not to present evidence of Mason's background to the jury. Defense counsel's decision addresses the fundamental dilemma for penalty-phase representations. To some, recounting a childhood filled with drug use and crime would arouse sympathy and provide an explanation for otherwise heinously violent crimes, but to others it would tell a story of waste, lifelong moral turpitude, and incorrigibility. The omitted evidence here is far less mitigating than the relevant evidence in *Bell v. Cone*, that the defendant had been traumatized during honorable military service to his country, the omission of which the Supreme Court determined not to be unconstitutionally ineffective assistance. The evidence omitted here is potentially aggravating in the minds of some jurors, and its probable effect is a judgment call for counsel in the context of his understanding of the jury's composition. Defense counsel's choice to omit Mason's background, and it was a choice, is a quintessential strategic decision that cannot form the basis of a *Strickland* challenge.

This court also flatly suggests that this particular evidence, of Mason's troubled childhood and early drug use, would not have permitted the prosecution to introduce rebuttal evidence regarding

Mason's extensive, violent, and contemporaneous history of criminal activity. The court's claim here is nothing more than a assertion: "Testimony that simply put Mason's childhood into context without misinterpreting it would not have been the subject to the prosecutor's rebuttal evidence, which mostly concerned Mason's character." Slip op. at 29. The court's cursory opinion of Ohio evidence law narrowly construes the trial court's explicit ruling on this matter. See Tr. at 4211. The trial court indicated that extremely damaging evidence could have been introduced "had the Defense elected to proceed with a more expansive mitigation strategy." JA at 1761. Mason concedes that "[t]he trial court ruled that such evidence," referring to evidence of Mason's past criminal behavior, "would be admissible." Mason's Br. at 13. Defense counsel undoubtedly could have presented the evidence notwithstanding the trial court's determination, inviting the introduction of Mason's prior criminal record by the prosecution, and appealed a district court decision to admit Mason's negative history as rebuttal evidence. Yet we have never held that defense counsel is constitutionally obligated to take such a risk, especially when the trial court's ruling is far from clearly the abuse of discretion that would be required to overturn its evidentiary determination.

Indeed, the trial court's ruling makes ample sense. By raising the factual question of his background and prior activities, the defendant makes his entire background relevant. After all, the mitigation case with this evidence would have been that Mason was a victim of his parents' violence and drug activities and that this sorrowful childhood led

an otherwise innocent boy into personal drug use and ultimately to commit a horribly violent crime. The evidence of his criminal record would have been directly relevant to rebut this story, showing a young man, far from innocent, who has engaged in a consistent campaign of violent crime, including a rape eerily similar to that for which he had just been convicted.

Finally, given the infirmity of this court's determination regarding defense counsel's potential ineffectiveness, there is even less legal foundation for its decision to remand this case for an *evidentiary hearing* on his ineffectiveness claim. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") explicitly limits the circumstances under which an evidentiary hearing may be granted in habeas proceedings. *See* 28 U.S.C. § 2254(e)(2). If Mason failed to develop a sufficient "factual basis of a claim in State court proceedings," this court must dismiss the claim and cannot order an evidentiary hearing *unless* the claim relies on a "new rule of constitutional law made retroactively applicable to cases on collateral review by the Supreme Court, that was previously unavailable; *or* a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2). Neither of these conditions obtain in this case. This court makes clear that Mason raised these arguments in Ohio state courts. Mason also had an opportunity to introduce extensive evidence, of which he somewhat availed himself, regarding what defense counsel could have done. Any factual deficiency in Mason's claim that prevents us from accepting it may not be cured by a

federal court in habeas proceedings when there is no evidence in the record that Ohio courts prevented Mason from making a sufficient factual record. This court's current remedy of ordering an evidentiary hearing is invalid under Section 2254(e)(2) of AEDPA.

Ironically, if counsel's true aim is to see that his client's life is spared, the most effective tactic under cases such as the one today is to omit some step so that our court will later find counsel was *not* "effective." Creative habeas counsel can conjure up myriad possible scenarios in which a claim can *now* be made that some information would surely have convinced a jury to spare the life of a heinous murderer, without having to face the actual consequences that such information could easily have been ineffective, or worse. In fact, if trial counsel were to use the "kitchen sink" approach seemingly advanced by respondent's counsel, and introduce every scrap of information now claimed to be helpful (including his becoming "certified in Heating and Air Conditioning," *see* Mason's Br. at 72 n.28), one could probably find *that* approach "ineffective" for depriving the defendant of the argument that has proven, in this circuit at least, to be the most efficacious in achieving defendant's goal of continued life.

The fact that trial strategy did not work does not make the *ex ante* decision to employ it, under circumstances where hardly any trial strategies would seem attractive, constitutionally defective lawyering. Given the Supreme Court's admonishments against using the penalty phase and

the Sixth Amendment as a lever in death penalty cases, and the sound strategic reasons for the omission of Mason's background by his counsel, I respectfully dissent.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:99 CV 524

KATZ, J.

MAURICE A. MASON,

Petitioner,

-vs-

BETTY MITCHELL, Warden,

Respondent.

MEMORANDUM OPINION

Filed: May 9, 2000

This matter is before the Court on Petitioner's motion for a writ of habeas corpus and corrected motion for a writ of habeas corpus (Doc. Nos. 22 & 25); the State's motion to strike Petitioner's traverse (Doc. No. 67); and on Petitioner's motion for an evidentiary hearing (Doc. No. 70). For the following reasons, Petitioner's motion for a writ of habeas corpus will be denied. The State's motion to strike will be denied. Petitioner's motion for an evidentiary hearing will be denied.

BACKGROUND

In February, 1993, Petitioner Maurice Mason, an African-American man, was a resident of Marion,

Ohio. Decedent Robin Dennis, a white woman, was a resident of Richwood, Ohio, and was acquainted with Mason. Dennis was last seen alive on February 8, 1993. On February 15, 1993, Dennis' body was found in an abandoned building in a rural area north of Marion, Ohio. The coroner determined that she had died several days earlier as a result of blunt force trauma causing multiple skull fractures. The probable weapon, a blood-stained board with protruding nails, was found twenty feet from Dennis' body.

Evidence that Dennis had been raped was also found at the scene. When Dennis' body was discovered, she was wearing only a bra; her jeans and panties were positioned around her ankles and lower leg. She had been strangled, and there were bruises on her head, face, and body. Inside and around Dennis' car, which was found near the murder site, forensic investigators discovered Nike tennis shoe impressions and type B blood, Dennis' blood type; the location of the tennis shoe marks and the blood were consistent with a struggle having taken place inside and around the car. Semen was found in Dennis' vagina and on her panties; DNA testing determined that the semen was Mason's.

Two witnesses saw a person fitting Mason's description walking in the area of the murder site between 4:10 and 4:15 p.m. on the day Dennis disappeared. Police found Mason's car keys on the front seat of Dennis' car. Type B blood was found on

the side of a Nike[1] tennis shoe Mason was wearing on February 12, 1993.

Petitioner Mason was charged with the rape and aggravated murder of Robin Dennis. The case was tried to a jury between May 31, and June 29, 1994. The jury convicted Mason and recommended imposition of the death penalty. On July 7, 1994, the trial court adopted the jury's recommendation that Mason be sentenced to death. The conviction and sentence were upheld on direct appeal.[2] On July 15, 1999, Petitioner filed this petition for a writ of habeas corpus, challenging both his conviction and sentence. He raises the following twenty-five challenges to the proceedings in the trial court and on appeal:

1. Petitioner claims he was denied his right to investigative and expert assistance in preparing and presenting his defense because the trial court refused to authorize the expenditure of funds for experts in the areas of: soil analysis; shoe print analysis; blood analysis; DNA analysis; the reliability of eyewitness identification; homicide investigation; mass media; and mental health. He further argues that the Supreme Court of

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[1] Dennis had also been wearing Nike tennis shoes at the time of the murder. Forensic investigators were not able to determine whether the shoes Mason was wearing matched the shoe marks found in and around Dennis' car.

[2] *See Ohio v. Mason*, 82 Ohio St. 3d 144,694 N.E.2d 932 (1998), *aff'g* 1997 WL 317431 (Ohio Ct. App. June 6, 1997); 1996 WL 715479 (Ohio Ct. App. Dec. 9, 1996); 1996 WL 715480 (Ohio Ct. App. Dec. 9, 1996).

Ohio used a too-deferential standard in its review of the trial court's denial of Petitioner's requests for the aforementioned experts.

2. Petitioner raises a claim of ineffective assistance of counsel arising out of counsel's preparation of the motions for expert assistance; preparation of Petitioner's motions to suppress; the amount of time Petitioner's counsel spent preparing for the trial; the trial court's denial of Petitioner's request for a continuance; counsel's performance during the jury selection process; counsel's performance during the guilt/innocence phase of the case; counsel's failure to present mitigation evidence during the penalty phase of the case; lead counsel's absence from the courtroom during portions of the case; failure to object to an *Allen* charge; and failure properly to present a motion for a new trial. He also claims that his appellate counsel's performance was deficient because appellate counsel either (a) failed on appeal to present his complaints arising out of the trial, or (b) improperly defaulted such claims by failing to address them on appeal.

3. Petitioner claims that the State improperly failed to disclose *Brady* material.

4. Petitioner claims that the Ohio Supreme Court erred by deferring to the jury and trial court's determination that the death penalty was proper in this case.

5. Petitioner claims that the imposition of the death penalty was improper because the state was allowed to give the first and last arguments during the mitigation phase closing arguments.

6. Petitioner claims that the imposition of the death penalty by electrocution constitutes cruel and unusual punishment in all cases.

7. Petitioner claims that the imposition of the death penalty constitutes an unconstitutional violation of international law in all cases.

8. Petitioner claims that Ohio's statutory requirement that the defendant prove the existence of mitigating factors in the penalty phase is unconstitutional.

9. Petitioner claims that it was impossible for him to get a fair trial in the venue in which he was tried because of pretrial publicity.

10. Petitioner claims that his conviction and sentence were unconstitutional because his trial was infested with racial discrimination.

11. Petitioner claims that inculpatory statements he made to police officers were improperly introduced during trial in violation of his Fourth Amendment rights.

12. Petitioner claims that he was denied his right to trial by a fair and impartial jury because the trial court improperly limited counsel's investigation into jurors' attitudes about race; because the trial court inappropriately expressed his personal view on the death

penalty; because the prosecutor repeatedly referred to the first phase of Petitioner's trial as the "guilt" phase; because counsel failed to question two jurors who were victims of domestic violence in detail about that issue; and because counsel failed to examine potential jurors about their feelings about the victim being pregnant at the time of her death.

13. Petitioner claims that he was denied his right to trial by a fair and impartial jury because the prosecution (a) successfully challenged for cause all potential jurors who stated that their beliefs about the death penalty would prevent them from fairly considering death as a penalty, and (b) used its peremptory challenges to remove three potential jurors who expressed scruples about the death penalty.

14. Petitioner claims that he was denied due process because of the admission into evidence of inflammatory color photographs of the murder victim. He claims that the prejudicial impact of those photographs outweighed their probative value.

15. Petitioner claims that the jury was provided with transcripts of statements Petitioner made to the police, and that those statement were transcribed in such a manner as to suggest racial stereotypes.

16. Petitioner claims that the trial court inappropriately prevented him from presenting evidence that the victim's husband

had a history of violence in order to show that the murder had, in fact, been committed by the victim's husband.

17. Petitioner claims that the prosecutor engaged in prosecutorial misconduct, and that the trial court improperly failed to give a curative instruction.

18. Petitioner claims that the trial court erred by instructing the jury that it must determine that Petitioner was not guilty of the greater charge of aggravated murder before considering the lesser charge of murder brought against Petitioner.

19. Petitioner claims that the prosecution failed to present evidence from which a reasonable jury could find all the elements of aggravated murder beyond a reasonable doubt.

20. Petitioner claims that the trial court's instructions at the penalty phase of the trial were improper.

21. Petitioner claims that he was denied his right to a trial free of racial bias because the only African-American venireperson was successfully challenged for cause after he stated that he could not vote for the death penalty, and because some of the jurors made racially derogatory remarks while they were sequestered and during deliberations.

22. Petitioner claims that the trial court gave an improper *Allen* charge during jury deliberations at the penalty phase of the trial.

23. Petitioner claims that imposition of the death penalty in this case is so disproportionate to the offense as to violate the Eighth Amendment.

24. Petitioner claims the trial court improperly rejected his allegations of juror misconduct - namely, racial bias by several jurors, sleeping by Juror Straub, and an improper investigation by Juror Downs.

25. Petitioner claims that Ohio's death penalty statute is facially unconstitutional.

Respondent filed her return of writ on September 2, 1999. Thereafter, Petitioner requested and was granted numerous extensions of time in which to file his traverse; the final such extension made Petitioner's traverse due on January 7, 2000.

Petitioner filed his traverse on January 18, 2000, without seeking leave for a further extension of time. Respondent has moved the Court to strike Petitioner's traverse as untimely filed. Petitioner responds that he was delayed because counsel encountered numerous technical difficulties with his computer.

In addition, Petitioner has filed a motion for an evidentiary hearing on his claims numbered 1, 2, 6, 10, 12, 21, 23, and 24. The State has filed opposition to that motion.

The Court discusses the parties' contentions below.

MOTION TO STRIKE PETITIONER'S TRAVERSE

Respondent has moved to strike Petitioner's traverse as untimely. The Court agrees with Respondent - and Petitioner admits - that it was improper for Petitioner to file his traverse late without leave of Court, especially in light of the number of extensions Petitioner was given. However, in light of the seriousness of the penalty Petitioner faces, the Court finds it proper to consider the arguments contained in Petitioner's traverse.

Accordingly, the Court will consider the parties' arguments on their merits. The Court has reorganized Petitioner's arguments into six separate categories, and will consider them in somewhat chronological order. The Court will address Petitioner's request for an evidentiary hearing as it addresses Petitioner's arguments on the merits.

MOTIONS FOR HABEAS CORPUS AND FOR EVIDENTIARY HEARING

Petitioner has filed his motion for a writ of habeas corpus under 28 U.S.C. § 2254, which permits a prisoner in state custody to challenge his incarceration "on the ground that he is in custody in violation of the Constitution or law or treaties of the United States." Petitioner raises numerous challenges to his conviction and sentence.

A. Claims Arising out of State's Pretrial Conduct

1. Fourth Amendment Violation Arising out of Police Interrogation

The first chronologically occurring event about which Petitioner complains appears in claim number eleven of his petition. Petitioner claims that the police improperly interrogated him in violation of his Fourth Amendment rights, and that inculpatory statements he made during that interrogation were improperly admitted at trial in violation of *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

At the hearing on Mason's motion to suppress the statements he made during the two challenged interrogations, the evidence showed that Petitioner was first interrogated on February 10, 1993, two days after the victim disappeared, and five days before her body was discovered. The first interrogation was conducted at the police station, was tape recorded, and lasted eighteen minutes. Both Petitioner Mason and Detective Dennis Potts testified that Mason voluntarily accompanied Potts to the police station, that Mason was never told he could not leave, and that Potts drove Mason back to his home after the interview.

The second interrogation took place on February 12, 1993, and lasted approximately four hours. Both Mason and Potts testified that Mason voluntarily accompanied Potts to the police station, and that Mason was not formally arrested or told he could not leave at any time during the interview. Mason's parole officer, Doug Schiefer, observed the February 12, 1993 interview through a one-way mirror and determined, on the basis of information adduced during that interview, that Mason should be

arrested for parole violations including alcohol consumption and associating with known felons.

Half an hour after the interview ended, Schiefer arrested Mason for violation of his parole. Mason was given his *Miranda* warnings at that time, refused to waive his rights, and the interview concluded.

There seems to be no dispute that Mason was a suspect at the time of both interrogations.

There also seems to be no dispute that Mason was not arrested until after the second interview had concluded, and could have left prior to that time. During the second interview, Mason asked several times whether he was under arrest, and was repeatedly assured that he was not. Mason himself testified as follows at the hearing on his motion to suppress:

Q. Now, basically what happened is that on February 10th, that's the first time you talked to Detective Potts. You didn't believe at all that they thought you had anything to do with this crime, did you?

A. I didn't, no, sir.

Q. And so you agreed to cooperate with 'em?

A. Um-hum.

Q. And that was a voluntary choice on your part, wasn't it?

A. Right.

Q. And on February 12th when Detective Potts came to your house, you still

didn't believe that they thought you had anything to do with this case?

A. Why should I?

Q. And so you made a voluntary choice to cooperate with them?

A. Yes, I did.

Q. And that really was your opinion throughout the entire interview on the 12th, until the very end when they started turning up the heat in the interview, and then what you say pointing the fingers at you, isn't that what happened?

A. Basically, yeah.

Q. And when they came in and read you your rights - they came in and read you your rights, and you said, "so what? I'm under arrest or something?" That's what you said at 4:03, isn't it?

A. Um-hum.

Q. Because that's the first time that you understood that you were going to be placed under arrest, isn't it?

A. Right.

Q. And prior to that, you were never placed under arrest, were you?

A. Hum-um.

The issue before the trial court at the motion to suppress, and the issue before this Court, is whether Petitioner was "in custody" for purposes of the Fourth Amendment at the time of the two interrogations, so as to trigger his right to *Miranda* warnings. If Petitioner was "in custody," the police officers who interviewed him violated his rights, and

the inculpatory statements he made during those interviews should not have been admitted into evidence. If Petitioner was not "in custody," his right to *Miranda* warnings was not triggered, and it was proper to admit Petitioner's inculpatory statements. *See Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612.

An individual is "in custody" only where there has been a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Becheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983). The only relevant inquiry is how a reasonable person in the suspect's position would have understood the situation. A police officer's undisclosed view that the individual under questioning is a suspect is not relevant to the question of whether that individual is in custody. *Stansbury v. California*, 511 U.S. 318, 324, 114 S. Ct. 11526, 1529-30, 128 L. Ed. 2d 293 (1994).

The trial court found that Petitioner was not in custody on the basis of Petitioner's testimony that he voluntarily accompanied the police to the police station for questioning, and that he understood he was not under arrest at the time of the interrogations. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the trial court's factual determination that Petitioner understood he was not under arrest at the time of the interrogations is presumed to be correct unless

the petitioner rebuts it by clear and convincing evidence.[3] 28 U.S.C. § 2254(e)(l).

Petitioner has not attempted to rebut the trial court's factual determination on that issue. Nor could he, since the trial court based its determination on Petitioner's own testimony that he believed he was not a suspect and understood he was not under arrest at the time of the interrogations.

Notwithstanding his own testimony that he understood he was not under arrest and that there was no formal restraint on his movement, Petitioner argues that he was in custody at the time of the two interrogations, because the interrogations occurred at the police station and because he was a suspect in the case.

Petitioner misstates the law. The fact that an individual is a suspect in a criminal case is not relevant to the issue of whether he is in custody for *Miranda* purposes, as long as the police *do not convey* to the individual that he is a suspect.

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[3] Petitioner has argued that the AEDPA does not govern this case, because his trial and conviction occurred before AEDPA's effective date of April 24, 1996. That argument lacks merit. The provisions of AEDPA that are codified in 28 U.S.C. § 2254 apply to all habeas corpus proceedings that are filed on or after April 24, 1996. *Lindh v. Murphy*, 117 S. Ct. 2059 (1997); *accord Terry Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Michael Williams v. Taylor*, 120 S. Ct. 1479 (2000). The relevant date is the filing of the habeas petition, not the date of conviction. *See Calderon v. United States Dist. Ct. Cent. Dist. Cal.*, 128 F.3d 1283, 1287 n.3 (1997); *Nobles v. Johnson*, 127 F.3d 409, 413-15 (5th Cir. 1997); *Holman v. Gilmore*, 126 F.3d 876, 879-80 (7th Cir. 1997).

Stansbury, 511 U.S. at 324, 114 S. Ct. at 1529-30. Nor is the fact that the interrogation occurred at the police station dispositive of the issue, because "some suspects are free to come and go until the police decide to make an arrest." *Id.* at 325, 114 S. Ct. at 1530.

There is no dispute in this case the Petitioner believed both that he was not a suspect, and that he was not under arrest, until the police formally arrested him half an hour after his second interrogation concluded. There is no dispute in this case that the actual decision to arrest did not occur until the time when the second interrogation concluded. These undisputed facts compel a finding that Petitioner was not in custody at the time of the two interrogations. Therefore, *Miranda* warnings were not required, and admission of his statements at trial was proper.

Petitioner's eleventh challenge to his conviction and sentence is meritless.

2. Failure to Disclose *Brady* Material

In claim number three, Petitioner alleges that the State improperly failed to supply him with three pieces of exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *Brady* requires the prosecution to provide an accused with all evidence favorable to him, "where the evidence is material either to guilt or to punishment." *Id.* at 87, 83 S. Ct. at 1196-97. The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *United*

States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

Petitioner did not raise this claim on direct appeal from his conviction. Thus, the claim is procedurally defaulted unless Petitioner can establish cause for his failure to raise it and prejudice attributable thereto, *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506-2507, 53 L. Ed. 2d 594 (1977), or that the constitutional error probably led to the conviction of an innocent person, *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50, 91 L. Ed. 2d 397 (1986).

Petitioner does not dispute that he did not raise his *Brady* claim on direct appeal. He argues, however, that the Court should not find his *Brady* claim to be procedurally defaulted because the claim arises out of governmental misconduct. That argument lacks merit. It is well established that a habeas petitioner who fails to raise a *Brady* claim on direct appeal cannot bring such a claim in a collateral attack on his conviction and/or sentence without a demonstration of both cause and prejudice. *Gray v. Netherland*, 5 18 U.S. 1047, 117 S. Ct. 22, 135 L. Ed. 2d 457 (1996).

With regard to cause and prejudice, Petitioner argues summarily that he "has cause for not earlier presenting this issue in state court. Mason has been prejudiced thereby because he lost an opportunity for federal review of a claim of merit." (Pet'r's Traverse at 100.) He makes no factual arguments to support either proposition. He has identified no basis to support a finding of cause for his failure to raise his *Brady* arguments on direct appeal. Nor has he

demonstrated that the exculpatory evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (19 92). Accordingly, the Court finds that Petitioner has procedurally default his *Brady* claim.

Furthermore, the Court has conducte an independent review of the materials Petitioner has submitted, and has determined that none of those materials would compel a finding of a *Brady* violation, even were this Court to consider Petitioner's *Brady* claim on the merits. In order to make out a true *Brady* violation, a petitioner must show not only that the state failed to disclose exculpatory evidence, but that "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 119 S. Ct. at 1948.

Petitioner first indicates that four days after Dennis' body was found, Robert Rodeffer stated that he had been present at Dennis' murder, and gave information about it. The Court has reviewed the contemporaneous reports of Rodeffer's statement. Those reports indicate that Rodeffer was both heavily intoxicated and suicidal at the time,[4] and that he made those statements as part of an evaluation that was being conducted at Marion General Hospital. Both the reports of Rodeffer's conduct and the content of the assertions Rodeffer

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[4] Rodeffer apparently had consumed at least 7/8 of a fifth bottle of whiskey and seven sleeping pills. He attempted to hang himself with a bedsheet a few days after making his statement.

made indicate the presence of serious mental health problems. The factual statements Rodeffer made about the cause of death were inconsistent with Dennis' physical injuries.

On these facts, it strains credibility past the breaking point to suggest that there is a reasonable probability Rodeffer's evidence would have produced a different verdict. It is not at all unusual, after a murder has received widespread media attention, for mentally unstable people to come forward with "information" about the killing that ultimately proves to be inconsistent with the actual facts of the case. Even a cursory review of Rodeffer's conduct on the night he made his statement, and the content of the statement itself, reveals Rodeffer to be one of those people. The state's failure to disclose Rodeffer's statement does not create a *Brady* violation.

Petitioner next indicates that the state failed to disclose the existence of two separate telephone conversations Captain Al Hayden had with Dennis' friends Michael and Carolyn Young three days before the jury was impaneled. The evidence adduced at trial showed that Robin Dennis and her husband Chris had spent the night of February 7-8, 1993 at the Youngs' home after a party at which significant amounts of alcohol were consumed. The morning of February 8, 1993, the day Robin Dennis disappeared, Petitioner Mason and his wife joined the group. Evidence adduced at the trial showed that Robin Dennis and Petitioner had left the Youngs' house together at about 2:30 that afternoon. Chris Dennis was lying under the coffee table, passed out, from

before the time Robin Dennis and Petitioner left the house until between 6:00 and 10:00 that evening.

During Hayden's conversations with the Youngs, both Michael and Carolyn Young indicated that they had moved from Ohio to South Carolina because they were receiving threatening letters and telephone calls from unknown people in connection with the trial. Michael Young told Captain Hayden that when Chris Dennis woke up late in the evening on February 8, 1993, he was angry that Robin Dennis was not there, and said he would kill her when he found her. Carolyn Young said she thought she had seen, several hours after Dennis was last seen alive, the Harley-Davidson T-shirt Dennis was wearing at the time of the murder. Carolyn Young said she thought she had seen Robin Dennis riding in a car on the evening of February 8, 1993, several hours after the prosecution argued that Petitioner killed Dennis. Both Youngs expressed concerns that Chris Dennis might have killed his wife in order to gain the proceeds of her life insurance. Petitioner claims that he was entitled to disclosure of those statements, because they tend to support his defense that Chris Dennis was the real murderer.

The Court has reviewed the record. Both Michael and Carolyn Young testified at trial. Michael Young testified on direct examination that Chris Dennis (decedent's husband) had said "If I find her, I'll kill her" on the night of February 8, 1993. (Tr. at 2442, line 17-18.)[5] Petitioner had ample

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[5] Carolyn Young's testimony corroborates that statement. (Tr. at 2676.)

opportunity to cross-examine Michael Young as to that statement, and did so cross-examine him. (Tr. at 2477-78.)

Carolyn Young testified on direct examination that Chris Dennis showed her a black Harley-Davidson T-shirt a few hours after Robin Dennis disappeared. (Tr. at 2601-03.) She also testified that Robin and Chris Dennis owned at least two Harley Davidson T-shirts,[6] and that the T-shirt Chris Dennis showed her was not the same T-shirt found near the victim's body. (Tr. at 2604-05.) Petitioner had ample opportunity to cross-examine Carolyn Young about that testimony, and did so cross-examine her. (Tr. at 2684-86.)

Carolyn Young also testified on direct examination that she thought she saw the victim alive at about 9:45 on the evening of February 8, 1993. (Tr. at 2606-10.) Upon further examination, she testified that she believed the car was the victim's because it was a beige Skylark with one headlight missing, but that lighting conditions were poor and she was not wearing her glasses, so she was not certain that the individual in the car was Robin Dennis. (Tr. at 2609-10.) Petitioner had ample opportunity to cross-examine Carolyn Young on that issue, and did so cross-examine her. (Tr. at 2677-82.)

Carolyn Young's cousin, Melissa Wright, also testified about Carolyn Young's statement that she

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[6] Other testimony established that Chris and Robin Dennis each owned several Harley Davidson T-shirts. (Tr. at 2718, 3067.)

had seen the victim alive on the evening of February 8, 1993, and was cross-examined in detail about her testimony. (Tr. at 2547-48 & 2566-69.)

Petitioner attempted to elicit testimony from Carolyn Young on cross examination that she believed Chris Dennis had arranged for his wife to be killed for her life insurance money. (Tr. at 2646.) The trial court refused to allow the testimony because Carolyn Young could not identify a factual basis for her belief. Petitioner questioned both Michael and Carolyn Young about Robin Dennis' life insurance policy.

Thus, the record demonstrates conclusively that Petitioner not only had access to, but actually attempted to proffer at trial, every piece of exculpatory evidence he now alleges he was unfairly deprived of by the state's failure to disclose Captain Hayden's telephone conversations with Michael and Carolyn Young. On this record, Petitioner cannot demonstrate a reasonable probability that disclosure of the undisclosed evidence would have produced a different verdict. The state's failure to disclose Captain Hayden's telephone conversations with Michael and Carolyn Young does not create a *Brady* violation.

Finally, Petitioner claims that the state failed to disclose pretrial statements of witnesses Ricky McDuffie, Gregory Bruce Allen Jones, Michael Young, Melissa Wright, Carolyn Young, and Chris Dennis that differ from the statements offered by those witnesses at trial. Petitioner has filed nothing with the Court to indicate that any such documents exist, and the Court's review of the trial transcript

demonstrates that Petitioner cross-examined each of the listed witnesses in detail, and frequently used pretrial statements from those witnesses for impeachment purposes. On this record, Petitioner cannot demonstrate a *Brady* violation arising out of the state's failure to provide inconsistent pretrial statements from Ricky McDuffie, Gregory Bruce Allen Jones, Michael Young, Melissa Wright, Carolyn Young, and Chris Dennis.

Petitioner's third challenge to his conviction and sentence is meritless.

B. Claims Relating to Jury Selection, Conduct, Instructions, and Deliberations

Petitioner has raised a number of challenges to the impartiality of the jury.

1. Failure to Transfer Venue

In claim number nine, Petitioner claims that it was impossible for him to get a fair trial in the venue in which he was tried because the venire was tainted by pretrial publicity. Petitioner moved for a transfer of venue, but did not raise this claim on direct appeal from his conviction. Thus, the claim is procedurally defaulted unless Petitioner can establish cause and prejudice. Petitioner claims that he has shown cause and prejudice because the local media coverage was so extensive that his trial attorney's failure to move for a transfer of venue amounted to ineffective assistance of counsel.

As has already been stated, this case arises out of the rape and murder of Robin Dennis, a white woman, by Petitioner Maurice Mason, an African-American man, on February 8, 1993, near Marion,

Ohio. The victim's disappearance and murder were covered in detail by local news media, so that most residents of the area knew something about the crime by the time the case went to trial. The bulk of the media coverage occurred around the time of the victim's disappearance. Petitioner has identified only two newspaper articles appearing after March, 1993, and none after September of that year.

Jury selection began on May 31, 1994. Before conducting voir dire, the trial court had each juror fill out a forty-one question form. The trial court then conducted individual voir dire of each venireperson, out of the presence of the other potential jurors, to determine both the venireperson's views on the death penalty, and whether pretrial publicity had influenced his or her views on Petitioner's guilt.

A handful of venire members were dismissed for cause after they indicated that they had formed opinions about Petitioner's guilt. Most of those venirepersons were personally acquainted with either Petitioner or the victim, or a close friend or relative of Petitioner or the victim. One or two venirepersons indicated that news reports had affected their opinions.

None of the individuals who served on the petit jury claimed any detailed knowledge about the case. The Juror who displayed the most knowledge was Juror Downs. Juror Downs indicated during individual voir dire that she had read a few newspaper articles about the murder the previous year. Upon questioning, she stated that:

Ms. Downs: I have read, like probably everybody in Marion County; I haven't read maybe as much as - well, maybe I have. I had a couple sisters that was pretty sick last year and died within a week of each other, so I was going back and forth. And a lot of times, I didn't read the paper.

. . .

Attorney Slagle: Do you remember any specifics at all?

Ms. Downs: Other than the girl's body was found and they had picked a - no, I don't think they picked a suspect up. I think a suspect was already incarcerated and, if I remember right, and I think they was waiting on DNA evidence.

(Tr. at 935-36.) No other juror who actually served claimed as much knowledge as Juror Downs. Juror Davis said that he had read an article about the case in the *Marion Star*, but that he considered it an untrustworthy newspaper, and had not formed any feelings about the case. (Tr. at 1014.) Jurors Bird, Furlong, Haines, Haney, Mahaffey, and Straub stated that they were unfamiliar with the case.

After individual voir dire was completed, the trial court conducted general voir dire in the presence of the entire venire. Jurors Crane, Dennis, Gleason, and McGuire were asked during general

voir dire whether they had heard anything about the case, and did not indicate that they had heard anything. Every juror who was impaneled stated that he or she could remain impartial and decide the case based only on the evidence presented at trial. The jury was sworn on June 2, 1994.

The issue the Court must decide on Petitioner's ninth challenge to his conviction and sentence is whether his appellate counsel's failure to raise the denial of his motion for a transfer of venue was so glaringly deficient that it amounted to ineffective assistance of counsel, and whether he has shown prejudice attributable thereto. If Petitioner cannot show cause and prejudice, his claim is procedurally defaulted.

Furthermore, since Petitioner has not ever argued, and does not now argue, that any particular juror actually revealed a disqualifying animus or unfavorable predisposition toward him during voir dire, his claim must be based on a presumption of prejudice, despite the fact that his trial counsel passed every member of the eventual jury for cause, and the trial court found each juror to be impartial. The trial court's determination that the petit jury was impartial is presumed to be correct unless the petitioner rebuts it by clear and convincing evidence. 28 U.S.C. § 2254(e)(l).

The facts in the record compel a finding that Petitioner cannot show cause and prejudice for his failure, on appeal, to raise the trial court's denial of his motion for a transfer of venue. Nor would such a claim have merit even were this Court to consider it. Pretrial publicity, in and of itself, does not inevitably

lead to an unfair trial. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554, 96 S. Ct. 2791, 2800, 49 L. Ed. 2d. 683 (1976). A juror's prior knowledge of the existence of the case, familiarity with the issues involved, or even some preexisting opinion as to the merits, does not in and of itself raise a presumption of jury taint. *DeLisle v. Rivers*, 161 F.3d 370, 382 (6th Cir. 1998). The doctrine of presumed prejudice is "rarely invoked and only in extreme situations," where the pretrial publicity is so inflammatory that it has "displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial." *United States v. McVeigh*, 153 F.2d 1166, 1181 (10th Cir. 1998).

This case displays none of the circumstances which federal courts have found sufficiently exceptional to merit a presumption of prejudice. No allegation has been made that the newspaper reports of Robin Dennis' disappearance and death were inflammatory. No allegation has been made that the venire as a whole exhibited indications of prejudice against Petitioner; indeed, only a handful of the 125 venirepersons were disqualified because of fixed opinions about Petitioner's guilt. Sixteen months passed between the time of the murder and the time of the trial, and the few venirepersons who stated that they had heard about the case generally indicated that their memories had faded. (*See* Tr. at 1034.) All of the jurors who actually served indicated that they knew little or nothing about the case before the trial. The jury was properly and repeatedly instructed not to read, watch, or listen to any news coverage of the case, or to discuss the trial with anyone, and they were sequestered during their

deliberations. On these facts, the Court must defer to the trial court's factual determination that the jury was not unduly tainted by pretrial publicity.

Petitioner's ninth challenge to his conviction and sentence is meritless.

2. Improper Conduct During Individual Voir Dire

In claim number twelve, Petitioner raises a number of challenges to the conduct of the individual voir dire which, he claims, denied him a trial by a fair and impartial jury. Specifically, Petitioner claims (a) that the trial court improperly limited his voir dire on the issue of race; (b) that the trial court improperly refused to remove venireperson Blake for cause; (c) that the trial court inappropriately made its views on the death penalty known to the trial jury; (d) that the prosecutor inappropriately described the "guilt or innocence" phase of the trial as the "guilt phase" during voir dire; (e) counsel failed to examine two female venirepersons who were domestic violence victims as to that issue; (f) defense counsel inappropriately described some of the mitigation factors Petitioner considered proffering as a "crybaby" defense; and (g) counsel failed to examine the potential jurors about their feelings on the victim being pregnant at the time of her murder.

Petitioner has also moved for an evidentiary hearing on those claims. Under the AEDPA, Petitioner is entitled to an evidentiary hearing only if he can demonstrate he was not at fault in failing to develop the factual basis of his claim in state court proceedings, *Michael Williams v. Taylor*, 120 S. Ct.

1479 (2000), or that his claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(A)(ii) & (B).

Petitioner's claim that he was denied his right to an impartial jury because the trial court improperly limited his voir dire on the issue of race lacks merit. The trial court had each venireperson fill out a forty-one question form that addressed race discrimination, and then spent three days conducting sequestered, individual voir dire of prospective jurors. Each prospective juror was questioned on his or her attitudes about race and race discrimination. Each prospective juror indicated that he or she would be able to decide the case impartially, and that Petitioner's race would not affect his or her decision in the case. The record does not reveal even a single instance where counsel attempted to ask a venireperson a question about race and was prevented from so doing. Petitioner has failed to demonstrate that he was unable to voir dire prospective jurors about their attitudes concerning race.

Petitioner's claim that he was denied his right to an impartial jury because the trial court improperly refused to remove venireperson Blake for cause after Mr. Blake indicated that he disapproved of interracial dating also lacks merit. First, it is by no means clear that Mr. Blake should have been

excused for cause. Mr. Blake stated that notwithstanding his objections to interracial relationships, he would convict Petitioner only if the prosecution proved all the elements of the charged crimes beyond a reasonable doubt. (Tr. at 801-02.) Second, and more importantly, Petitioner used one of his peremptory challenges to remove Mr. Blake from the panel. A defendant's right to a fair and impartial jury is not denied or impaired when he chooses to use a peremptory challenge to remove a juror who should have been excused for cause. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 2278 (1988); *accord United States v. Martinez-Salazar*, 120 S. Ct. 774, 781-82 (2000). Petitioner has not demonstrated that the trial court's refusal to dismiss Mr. Blake for cause resulted in his being tried by an impartial jury.

Petitioner's claim that he was denied his right to an impartial jury because the trial court inappropriately made its views on the death penalty known to the trial jury lacks merit as well. The following colloquy occurred during individual voir dire of Juror Crane:

> The Court: And what are your views or your thoughts about the death penalty?
>
> Ms. Crane: I think that it should be used, but I don't think it is used often enough. I mean, it seems like people are sentenced to death,

and then they don't do anything about it anyhow, so it's not really a deterrent.

The Court: Well, we won't debate that. There's been a lot of them have been executed recently. Not in Ohio, it hasn't been. But I agree with you there.

(Tr. at 964-65.)[7] The Court agrees that it is not proper for a judge to express his own views regarding the death penalty during a capital murder trial. In the context of this case, however, the trial court's isolated comment cannot have tainted the venire so as to deny Petitioner an impartial jury. The statement itself was relatively innocuous. Read in context, the Court is merely agreeing that the death penalty is not a significant deterrent to crime - not expressing a view on the propriety of capital punishment. It is undisputed that eleven of the twelve jurors who served never even heard the statement. From the perspective of the one juror who heard the judge's statement, Ms. Crane, the statement was a single, offhand comment that occurred toward the beginning of a month-long trial, and not as part of any official instruction on the law or the facts of the case; it is unlikely that Ms. Crane

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[7] Petitioner also complains that the trial judge told venireperson Kirkpatrick, who was not selected to serve on the jury, that imposition of the death penalty was proper under certain circumstances. (Tr. at 815.) Since that statement was not heard by any juror who actually served, it cannot have contributed to the creation of a biased jury.

remembered the statement beyond the conclusion of opening statements. Furthermore, the trial court properly cured any taint that might have been created by instructing the jurors to disregard any indication of the trial court's view of the case. *Cf. Scott v. Mitchell*, Nos. 98-4272, 98-4321, __ F.3d __, 2000 WL 390525, at *23 (6th Cir. Apr. 19, 2000) ("Allegations of jury bias must be viewed with skepticism when the challenged influence occurred before the jurors took their oath to be impartial."). Petitioner has not demonstrated that the trial court's statement deprived him of his right to an impartial jury.

Petitioner's claim that he was denied his right to an impartial jury because the prosecutor inappropriately described the "guilt or innocence" phase of the trial as the "guilt phase" during the voir dire of three jurors who served lacks merit. The prosecutor's reference to the "guilt phase" was merely a convenient shorthand for the first phase of the trial, and did not create a presumption of guilt.

Petitioner's claim that he was denied his right to an impartial jury because counsel failed to examine two female venirepersons who were domestic violence victims as to that issue lacks merit. The record demonstrates that both jurors who indicated histories of domestic violence were, in fact, questioned about that circumstance to counsel's satisfaction.

Petitioner's claim that he was denied his right to an impartial jury because defense counsel inappropriately described some of the mitigation factors Petitioner considered proffering as a

"crybaby" defense lacks merit. A review of the transcript demonstrates that Petitioner's counsel questioned venirepersons about whether they considered certain mitigation factors to be a "crybaby" defense in order to identify and weed out potential jurors who would be inclined to rule disfavorably to Petitioner. The most effective way of determining whether a venireperson would consider Petitioner's mitigation evidence to be a "crybaby" defense was to ask the question. Indeed, if Petitioner's counsel had failed to inquire into venirepersons' attitudes regarding mitigation evidence, Petitioner might well have raised that failure as a point of error. Petitioner has not demonstrated that his counsel's reference to a "crybaby" defense deprived him of his right to an unbiased jury.

Petitioner's claim that he was denied his right to an impartial jury because counsel failed to examine the potential jurors about their feelings relative to the victim being pregnant at the time of her murder lacks merit. The record demonstrates that the potential jurors were, in fact, informed that the victim was pregnant at the time of the murder and were examined about their attitudes regarding the victim's pregnancy.

Petitioner's twelfth challenge to his conviction and sentence is meritless. No evidentiary hearing is warranted.

3. "Death-Qualification" of Jury

In claim number thirteen, Petitioner claims that he was denied his right to trial by a fair and

impartial jury because the prosecution (a) successfully challenged for cause all potential jurors who stated that their beliefs about the death penalty would prevent them from fairly considering death as a penalty, and (b) used its peremptory challenges to remove three potential jurors who expressed scruples about the death penalty. Both arguments lack merit.

It is proper to exclude from a jury, for cause, a prospective juror who indicates that he or she would not under any circumstances vote for capital punishment. *Morgan v. Illinois*, 504 U.S. 719, 728, 112 S. Ct. 2222, 2229 (1992); *Lockhart v. McCree*, 476 U.S. 162, 173-76, 106 S. Ct. 1758, 1764-67 (1986). It is equally permissible for a prosecutor to exercise a peremptory challenge to remove a potential juror who would hesitate to impose the death penalty. *Luckett v. Kemna*, 203 F.3d 1052, 1054-55 (8th Cir. 2000); *Gosier v. Welborn*, 175 F.3d 504, 509-10 (7th Cir. 1999); *Keel v. French*, 162 F.3d 263, 271 (4th Cir. 1998). The actions of which Petitioner complains do not create a constitutional violation.

Petitioner's thirteenth challenge to his conviction and sentence is meritless.

4. "Acquittal First" Jury Instruction

In claim number eighteen, Petitioner claims that the trial court erred by giving an improper "acquittal first" instruction in violation of *Ohio v. Thomas*, 40 Ohio St. 3d 213, 219-20, 533 N.E.2d 286, 292 (1988). An "acquittal first" instruction is an instruction that allows the jury to consider a lesser-included offense only if they find that the government has failed to prove beyond a reasonable

doubt a defendant's guilt of the greater offense. In this case, the trial court charged the jury that:

> the first count of the indictment returned in this case charges the Defendant, Maurice A. Mason, with the crime of Aggravated Murder. This charge is founded upon Section 2903.01(B) of the Ohio Revised Code which provides in pertinent part as follows:
>
> No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, rape.
>
> Before you can find the Defendant guilty of the crime of Aggravated Murder, as he stands charged in the first count of the indictment, the State of Ohio must prove to each member of this jury, beyond a reasonable doubt, that on or about the 8th day of February, 1993, and in Marion County, Ohio, this Defendant, Maurice A. Mason, purposely caused the death of Robin Dennis while the Defendant was committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, rape.
>
> [The trial court then defined a number of terms relevant to the crime of Aggravated Murder.]
>
> If you find that the State proved beyond a reasonable doubt all the essential elements of the aggravating circumstances contained in the Specification, your finding must be guilty of the Specification.

> However, if you find that the State failed to prove any one of the essential elements of aggravated circumstances contained in the Specification, your finding must be not guilty of the Specification to Count 1 of the indictment.
>
> If you find the Defendant not guilty of Aggravated Murder, you will then continue with your deliberations and determine whether or not the State of Ohio proved beyond a reasonable doubt all the essential elements of the lesser crime of Murder.[8]

(Tr. at 4147-51.) Petitioner did not object to the instruction at trial. Thus, the claim is procedurally defaulted unless Petitioner can establish cause and prejudice. Petitioner claims that he has shown cause and prejudice because his trial attorney's failure to object to the instruction amounted to ineffective assistance of counsel.

Petitioner did object to the instruction on direct appeal. Notwithstanding Petitioner's failure to preserve the error below, the Ohio Supreme Court addressed the issue and determined that the instruction given by the trial court did not constitute an improper "acquittal first" instruction, *Ohio v. Mason*, 82 Ohio St. 3d 144, 160-61, 694 N.E.2d 932,951 (1998); *cf. New Hampshire v. Schultz*, 677 A.2d 675,678 (N.H. 1996); *Missouri v. Wise*, 879 S.W.2d 494, 517 (Mo. 1994) (en banc); *North Dakota v. Daulton*, 518 N.W.2d 719, 723 (N.D. 1994);

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[8] The trial court's instruction was taken from the approved Ohio Jury Instructions, §§ 503.01(B) & 503.015(B).

Thomas, 40 Ohio St. 3d at 220-21, 533 N.E.2d at 292-93; *Colorado v. Padilla*, 638 P.2d 15, 17-18 (Colo. 1981) (all holding similar instructions not to be "acquittal first" instructions).

When a prisoner raises a claim that his jury instructions were constitutionally infirm, the standard the Court applies on habeas review is highly demanding. "[T]he fact the instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72, 1 2 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991). Rather, the sole question on a petition for habeas corpus is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 72, 112 S. Ct. at 482.

In this case, the Ohio Supreme Court, which is the final arbiter charged with the interpretation of Ohio law, determined that the challenged jury instruction did not violate Ohio law. Furthermore, even if the instruction had been an "acquittal first" instruction, such instructions do not violate federal due process principles. Indeed, they are approved, and even mandated, in many states. *See, e.g.*, *Connecticut v. Abdalaziz*, 729 A.2d 725, 728 (Conn. 1999); *North Dakota v. Gagnon*, 589 N.W.2d 560, 565-56 (N.D. 1999); *Tennessee v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1998); *New Hampshire v. Taylor*, 677 A.2d 1093, 1097 (N.H. 1996); *see generally North Dakota v. Daulton*, 518 N.W.2d 719, 721 (N.D. 1994) and cases cited therein. On these facts, where Petitioner's only claim is that his trial counsel failed to object to a jury instruction that was approved under state law, he cannot show either cause for

failing to preserve what would have been a meritless objection, or that his counsel's failure to preserve that objection prejudiced him in any way.

Petitioner's eighteenth challenge to his conviction and sentence is meritless.

5. Trial Court's Instructions at Penalty Phase

In claim number twenty, Petitioner claims that the trial court's instructions at the penalty phase of the trial gave the jury inadequate guidance and created an unreliable sentencing determination. The trial court charged the jury as follows:

> The evidence [in the penalty phase] . . . [includes all information which is relevant to] . . . any mitigating factors including, but not limited to, the nature and circumstances of the offense and the history, character, and background of the Defendant, and any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.[9]

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[9] The Ohio pattern jury instruction directs jurors to consider, in addition, mitigating factors including but not limited to:

> (1) whether the victim of the offense induced or facilitated it;
> (2) whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
> (3) whether at the time of committing the offense, the defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

The Prosecutor has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweigh the factors in mitigation of imposing the death sentence.

To outweigh means to weigh more than, to be more important than. It is the quality of the evidence that must be given primary consideration by you.

The quality of the evidence may or may not be commensurate with the quantity of the evidence. That is the number of witnesses or exhibits presented in this case. It is the quality or importance of the aggravated circumstances and the quality or importance

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(4) the youth of the defendant;
(5) the defendant's lack of a significant history of prior criminal convictions and delinquency adjudications;
(6) if the defendant was a participant in the offense but not the principal offender,
the degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts that led to the death of the victim; and
(7) any other factors that are relevant to the issue of whether the defendant should be sentenced to death.

Ohio Jury Instructions, § 503.106(A). None of those mitigating factors was relevant to the case at bar. There was no evidence presented that the victim induced the offense, or that Petitioner was under duress or suffered from a mental disorder. Youth was not a mitigating factor, as Petitioner was thirty at the time. Petitioner had a significant history of prior criminal convictions and delinquency adjudications. And Petitioner was the principal offender. Since none of the mitigating factors listed in the pattern jury instructions was involved in the case at bar, the trial court was correct to omit them from the instruction.

> of the mitigating factors which must be considered.
>
> The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.
>
> * * *
>
> You shall recommend the sentence of death if you unanimously, all twelve jurors, find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you shall unanimously, all twelve, recommend either a life sentence with parole eligibility after serving twenty years of imprisonment or a life sentence with parole eligibility after serving thirty years of imprisonment.

(Tr. at 4347-49.) Petitioner raises a number of challenges to the charge.

First, Petitioner objects to the trial court's explanation of the bifurcated trial made at the beginning of voir dire. The trial court explained that the first phase of the trial would determine Petitioner's guilt or innocence, and that the second phase of the trial, if necessary, would determine the penalty. (Tr. at 715-16.) Petitioner complains that the trial court's explanation "failed to give the jury any guidance in determining whether a death sentence would be appropriate." That argument lacks merit. The trial judge's description of the bifurcated trial procedure was correct, and was not part of the formal charge to the jury. The trial

court's description of the bifurcated trial procedure at voir dire did not render the jury instructions infirm.

Second, Petitioner argues that the jury instruction that was given relieved the state of its burden to prove each essential element of the crime beyond a reasonable doubt. That contention is factually incorrect. The transcript reveals that the trial court instructed the jury that they must "find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors" before the death penalty could be imposed. (Tr. at 4349.)

Third, Petitioner objects to the trial court's failure to define "mitigating factors" or "mitigation" in the jury instructions. That argument lacks also merit. So long as the sentencer is not precluded from considering any constitutionally relevant evidence, no particular instruction is required, and mitigating factors need not be defined. An instruction directing the jury to consider "all the evidence" is constitutionally sufficient. *Buchanan v. Angelone*, 11 8 S. Ct. 757, 761-62 (1998).

Fourth, Petitioner objects to the introduction of all of the evidence admitted during the guilt phase of the trial at the penalty phase. He argues generally that some of that evidence was not relevant to the penalty phase, although he has not identified any specific evidence fitting into that category. Petitioner's argument is meritless. It is proper for the jury to consider, during the penalty phase of a capital trial, all evidence concerning the nature and circumstances of the offense.

Furthermore, Petitioner invited reconsideration of all guilt phase evidence by arguing residual doubt at sentencing. The admission of that evidence was not error.

Fifth, Petitioner objects to the trial court's curative instruction that "the Defendant's right to appeal his conviction will not be limited in any way by your imposition of the death sentence," (tr. at 4349), given after Petitioner suggested twice during an unsworn statement to the jury that imposition of the death penalty would impair his appeal rights, (tr. at 4279-80). Petitioner argues that the curative instruction violates the rule of law set forth in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633 (1985). That argument has no foundation.

In *Caldwell*, the prosecuting attorney had stated in closing argument that the defendant's attorneys "would have you believe that you're going to kill this man and they know - they know that your decision is not the final decision. . . . Your job is reviewable. They know it." 472 U.S. at 325, 105 S. Ct. at 2637. The Supreme Court vacated the jury's imposition of the death penalty in that case, holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere." *Id.* at 328-29, 105 S. Ct. at 2639.

The Supreme Court has subsequently explained that Caldwell is relevant only to comments that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less

responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184, n. 15, 106 S. Ct. 2464, 2473, n. 15, 91 L. Ed. 2d 144 (1986). "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 8-9, 114 S. Ct. 2004, 2009-10 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407, 109 S. Ct. 1211, 1215, 103 L. Ed. 2d 435 (1989)). Nothing in *Caldwell* prohibits a trial court from giving the jury accurate instructions regarding post-sentencing procedures. *Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring); *Mapes v. Coyle*, 171 F.3d 408, 414-15 (6th Cir. 1999).

The trial court's instruction in the case at bar did not create a *Caldwell* violation. The instruction was a correct statement of the law. It did not mislead the jury regarding its role in the sentencing process. The jury was expressly instructed not to consider the subject of appeal in determining Petitioner's sentence. (Tr. at 4349-50.) No *Caldwell* violation occurred.

Sixth, Petitioner objects to the trial court's references to "aggravating circumstances" in the plural during the penalty phase of the trial, when only one such aggravating circumstance existed. That argument lacks merit. It is clear from the record that only one aggravating circumstance – rape – was brought to the jury's attention. In light of that undisputed fact, it cannot be said that the trial court's slip of the tongue "so infected the entire trial that the resulting conviction violates due process." *McGuire*, 502 U.S. at 72, 112 S. Ct. at 482.

Seventh, Petitioner objects to the trial court's denial of his requested instruction that the jury could consider only the circumstance of rape as an aggravating factor in determining whether or not to impose the death penalty. That argument lacks merit. It is not disputed that no other aggravating circumstances were presented for the jury's consideration.

Eighth, Petitioner objects to the trial court's denial of his requested instruction that the jury consider mercy as a factor in determining whether or not to impose the death penalty. That argument is without merit. It is not improper for a trial court to refuse a requested instruction on mercy. *Scott*, 2000 WL 390525, at *22; *Mapes*, 161 F.3d at 415-16; *Henderson v. Dugger*, 925 F.2d 1309, 1319 (11th Cir. 1991); *accord United States v. Webster*, 162 F.3d 308, 326-27 (5th Cir. 1998); *Davis v. Executive Dir. of Dep't of Corrections*, 100 F.3d 750, 775 (10th Cir. 1996). Petitioner and his counsel had ample opportunity to ask for mercy during Petitioner's unsworn statement to the jury and during counsel's closing argument, and did so argue. (Tr. at 4322 & 4336.)

Ninth, Petitioner objects to the trial court's denial of his requested instruction that the jury consider residual doubt as a factor in determining whether or not to impose the death penalty. That argument lacks merit. It is not improper for a trial court to refuse a requested instruction on residual doubt. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74, 188, 108 S. Ct. 2320, 2327, 2335, 101 L. Ed. 2d 155 (1988); *Hooks v. Ward*, 183 F.3d 1206, 1229 (10th

Cir. 1999). Furthermore, Petitioner's counsel discussed residual doubt at length during closing argument; thus, it is extremely unlikely that the requested instruction, if given, would have had any effect.

Tenth, Petitioner claims that the trial court improperly instructed the jury on all seven mitigating factors in Ohio Rev. Code § 2929.04(B), despite the fact that Petitioner presented evidence on only two of those factors. That contention is factually incorrect. The trial court modified the charge to include reference to only those mitigating factors about which Petitioner presented evidence and the final, "catch-all" category. (Tr. at 4347.)

Eleventh, Petitioner claims that the trial court improperly instructed the jury that its imposition of the death penalty was merely a "recommendation" to the trial court, and was not binding. He presents no record evidentiary support for that contention,[10] and the Court has been unable to find any support therefor.

Even if Petitioner had presented evidentiary support for his contention, the claim would lack

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[10] Petitioner has identified a portion of the individual voir dire of venireperson Lemaster, who was dismissed for cause after he stated that he could not impose a death sentence under any circumstances. Petitioner's counsel, in attempting to rehabilitate Mr. Lemaster, asked whether he would be able to recommend the death penalty if he knew the judge would have the final decision. Mr. Lemaster indicated that he would not, and was discharged for cause. (Tr. at 897). Since that discussion occurred out of the hearing of the jurors who served, it cannot have affected the verdict.

merit. Under Ohio law, a jury's imposition of the death penalty is, technically, a recommendation that is subject to the trial court's independent determination. Ohio Rev. Code § 2929.03(D)(2). It is not error so to instruct the jury. *Scott*, 2000 WL 390525, at *21; *Mapes*, 171 F.3d at 414-15.

Petitioner's twentieth challenge to his conviction and sentence is meritless.

6. Juror Racial Bias

In claim number twenty-one, Petitioner claims that he was denied his right to a trial free of racial bias because (a) the only African-American venireperson was successfully challenged for cause after he stated that he could not vote for the death penalty, and (b) some of the jurors made racially derogatory remarks while they were sequestered and during deliberations.

Petitioner has also moved for an evidentiary hearing on those claims. As stated before, Petitioner is entitled to an evidentiary hearing only if he can demonstrate that his claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A)(ii) & (B).

Petitioner cannot sustain his claim that he was denied his right to a trial free of racial bias because the only African-American venireperson was successfully challenged for cause after he stated that

he could not vote for the death penalty. The jury was selected from Marion County voter lists. There was only one African-American person on the 125-person venire.[11] No allegation has been made of any impropriety in connection with the procedures for selecting the venire; it appears that African-Americans were underrepresented on Petitioner's venire merely as a result of random variation.

During individual voir dire, the only African-American venireman was dismissed for cause after he indicated that he would not be able to recommend imposition of the death penalty under any circumstances. The trial court's voir dire of that venireman was, in relevant part

> Mr. Wade: "Well, my views on the death penalty is my religious views. I don't believe in the death penalty."
>
> The Court: [I]f I instruct you that the death penalty would be proper in a given situation and the law would provide for it, could you not then sign a verdict and follow the Court's instructions and join with your fellow jurors in signing a verdict?
>
> Mr. Wade: No, I couldn't sign it, because –

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[11] Marion County's population was estimated to be 4.67% African-American at the time of Petitioner's trial. http://www.census.gov/populatiodestimates/county/crh~crhoh94.txt.

The Court: You refuse to, regardless of how I instruct you?

Mr. Wade: Yeah, I don't believe a man has a right to play God. God says, "Thou shalt not kill," and that's how it is.

The Court: Under any circumstances?

Mr. Wade: The Bible doesn't say a circumstance. He says "kill." He says, "Thou shalt not kill," period.

(Tr. at 1291.) Since Mr. Wade indicated that he would not under any circumstances vote for capital punishment, it was proper for the trial court to dismiss him for cause. *McCree*, 476 U.S. at 173-76,106 S. Ct. at 1764-67.

Petitioner does not argue that Mr. Wade was not subject to dismissal for cause. He argues, however, that the resultant all-white jury violated his right to be tried by a fair cross section of the community. That argument lacks merit. The fair cross-section principle cannot be used to invalidate the cause dismissal of a prospective juror. *Id.* at 173, 106 S. Ct. at 1764. Nor does it require the petit jury to reflect the composition of the community at large, so long as the venire was selected in a racially neutral manner. *Id.* (citing *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 701-02, 42 L. Ed. 2d 690 (1975). Since Petitioner does not complain that the State's procedure for selecting jurors systematically excluded African-Americans, and since Mr. Wade was undisputedly subject to dismissal for cause,

Petitioner cannot validly complain that the fair cross-section requirement was violated.

Petitioner's claim that he was denied his right to a trial free of racial bias because some of the jurors made racially derogatory remarks while they were sequestered and during deliberations also lacks merit. After the conclusion of deliberations, Juror Haney complained about the conduct of some of the jurors while the jury was sequestered and during deliberations. The trial court conducted a detailed inquiry into Juror Haney's allegations, taking testimony from all twelve jurors.

The trial court's investigation produced the information that Juror Davis had, on two or three occasions, made jokes about Petitioner's habit of wearing a "dew rag,"[12] and had imitated Petitioner's style of speech. Some of the other jurors apparently joined in Davis' behavior. There were also jokes about the amount of beer consumed at a party the Dennises attended the night before the murder. All twelve jurors signed affidavits stating that racism had not influenced their deliberations or their decision. The trial court also questioned several jurors, including Haney, and all stated that they never saw any conduct that would have impaired Petitioner's right to a trial free of racial bias.

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[12] The term "dew rag" apparently originated in connection with the New Orleans funeral parade tradition. It has since been adopted not only into "gangsta" slang, but into the parlance of such diverse groups as bikers, survivalists, and health spa proprietors. It is doubtful that most modern users of the phrase are aware of its origins. The term is not in common use in northwestern Ohio.

The trial court found that the jurors' conduct did not impair Petitioner's ability to receive a fair trial. That factual determination is presumed to be correct unless the petitioner rebuts it by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has not done so. Nor has he suggested the existence of newly discovered evidence, that could not have been previously discovered through the exercise of due diligence, that would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found him guilty of murder or imposed the death penalty.

Petitioner's twenty-first challenge to his conviction and sentence is meritless.

7. *Allen* Charge

In claim number twenty-two, Petitioner claims that the trial court gave an improper *Allen*, or "dynamite," charge during jury deliberations at the penalty phase of the trial.

The guilt or innocence phase of the case was tried from June 2 to June 17, 1994. On June 18, 1994, the jury returned a verdict of guilty on all counts charged. The court then took a nine-day recess. The punishment phase of the case was presented to the jury on June 27, 1994.

The jury began its deliberations on June 27, 1994 at 3:50 p.m. Before they left the courtroom, the trial judge instructed them as follows:

> As in the last phase, members of the jury, it's getting late in the day, and I'm going to leave it to the jury. I'm going to allow you

to deliberate, and let's say about 5 o'clock Mr. McGuire, let the Court know as to whether you would like to deliberate further into the evening or if you think that we'd be better to break tonight. You will be sequestered and come back early tomorrow morning then when you're fresh and commence again.

But I'm going to have you deliberate a while this evening to see how far you might get. I don't want to know the status of your deliberations; I just want to know whether you wish to go further this evening rather than come back tomorrow morning.

(Tr. at 4353-54).

At 5:05 p.m. the jury foreman reported that the jury wished to break for the evening. The following colloquy ensued:

The Court:	Mr. McGuire, do you have - do you wish to report to the Court at this time?
Mr. McGuire:	I don't think we will be able to reach a decision.
The Court:	You won't - it won't pay any dividends to continue then this evening?
Mr. McGuire:	That's correct.
The Court:	Okay, then, that's fine. . . . we will bring you in whenever it's convenient in the morning. And after you come in fresh, then you can probably make better progress.

(Tr. at 4354-55.)

The jury returned to the courthouse to continue deliberations at 8:45 a.m. on June 28, 1994. At 2:20 p.m., the jury sent the trial court a note indicating that they were deadlocked. The trial court gave the jury a standard *Allen* charge. After giving the *Allen* charge, the trial court engaged in the following discussion with the jury foreman:

The Court:	Is there a possibility, Mr. McGuire, that after an additional period of time you may reach an agreement? And this instruction that I have given you, and considering that with the rest of the instructions?
Mr. McGuire:	No.
The Court:	Would you wish to return to the jury room and discuss it, this instruction, with the jurors and then return and respond to that question?
Mr. McGuire:	Yes.

(Tr. at 4372-73.)

The jury returned to its deliberations. At 8:50 a.m. on June 29, 1994, the jury unanimously returned a determination that Petitioner should be sentenced to death. The trial court polled the jury, and each juror indicated agreement with that sentence. On July 7, 1994, the trial court formally adopted the jury's determination that a sentence of death should be imposed on Petitioner.

Petitioner claims that the trial court erred by directing the jury to return to their deliberations after they twice indicated they were deadlocked. The Court disagrees. First, it is important to point out that the jury did not indicate they were deadlocked *twice*; they indicated they were deadlocked once, on June 28, 1994. The jury foreman's June 27, 1994 statement that the jury was unable to reach a decision was merely a request that the jury recess for the evening. The Supreme Court has expressly approved the use of *Allen* charges in capital cases. *Lowenfield v. Phelps*, 484 U.S. 231, 237-39, 108 S. Ct. 546, 551 (1988). It is not error for a trial court to give a jury a single *Allen* charge, which is what happened in this case.

Petitioner's twenty-second challenge to his conviction and sentence is meritless.

8. Juror Misconduct

In claim number twenty-four, Petitioner claims the trial court improperly rejected his allegations of juror misconduct on the basis of a misapplication of Ohio R. Evid. 606(B), which protects the privacy of a jury's deliberations from inquiry. Petitioner has also moved for an evidentiary hearing on this claim.

Ohio Rule of Evidence 606(B) provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to

> assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.

As has been stated, after the jury returned its verdict, Juror Haney complained about the conduct of some of the jurors while the jury was sequestered and during deliberations. All twelve jurors voluntarily submitted affidavits addressing the jurors' conduct during deliberations, without any request from the Court. The trial court then conducted a detailed inquiry into Juror Haney's allegations, which inquiry included live testimony from several jurors. Upon conclusion of the inquiry, the trial court determined that the conduct about which Juror Haney complained did not deprive Petitioner of a fair trial. That factual determination is entitled to a presumption of correctness that can be overcome only by clear and convincing evidence.

The trial court investigated, and rejected, Juror Haney's allegations concerning juror racial bias as evidenced by the "dew rag" jokes and use of African-American vernacular. This Court has previously addressed Petitioner's claims of juror racial bias and will not do so again at this juncture, except to state that Petitioner's claims in that regard lack merit for the reasons previously given.

The trial court investigated Juror Haney's allegation that Juror Dennis had improperly expressed an opinion concerning Petitioner's guilt prior to the conclusion of the trial. The trial court's investigation produced the information that during a long sidebar conference towards the end of a trial day during the guilt phase of the trial, Juror Dennis muttered "maybe he's pleading guilty," or words to that effect. (Tr. at 4467.) Juror Dennis later testified that he had not formed an opinion at that point. Rather, his comment was "just wishful thinking because it was late in the day and everybody was tired." (Tr. at 4469.)

The trial court found that Dennis' comment did not impair Petitioner's ability to receive a fair trial. That factual determination is presumed to be correct unless the petitioner rebuts it by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has not done so. Nor has he suggested the existence of newly discovered evidence, not reasonably discoverable through the exercise of due diligence, that would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would

have found him guilty of murder or imposed the death penalty.

The trial court also investigated, and rejected, Juror Haney's allegation that Juror Straub had slept through portions of the trial. That finding was made partly on the basis of the trial court's own perception that Juror Straub had been awake and attentive throughout the trial, (tr. at 4535), and partly on the basis of Juror Straub's own testimony to that effect. Petitioner has not provided clear and convincing evidence to rebut the trial court's factual determination. Nor has he suggested the existence of newly discovered evidence, not reasonably discoverable through the exercise of due diligence, that would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found him guilty of murder or imposed the death penalty.

The trial court also investigated Juror Haney's allegation that Juror Downs had conducted an improper investigation prior to the conclusion of the trial. The trial court's investigation produced the information that after the prosecution had presented to the jury a disassembled gun found at the murder scene, Juror Downs disassembled her husband's gun. The next day, she told some of the jurors that the wooden handle piece that was presented in the courtroom looked like the one in her husband's gun. All of the jurors testified that Juror Downs' investigation had not influenced their verdict.

The trial court found that Juror Downs' improper investigation had not affected the verdict. Petitioner has not provided clear and convincing

evidence to rebut the trial court's factual determination. Nor has he suggested the existence of newly discovered evidence, not reasonably discoverable through the exercise of due diligence, that would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found him guilty of murder or imposed the death penalty.

Notwithstanding the lack of evidence to rebut the trial court's factual determinations regarding Petitioner's allegations of juror misconduct, Petitioner argues that he should be entitled to an evidentiary hearing on his claims, and that the trial court improperly relied on Rule 606(B) to refuse to permit him to inquire into the jurors' deliberation process. This Court agrees with Petitioner that the trial court violated Rule 606(B), but not in the way argued by Petitioner. Rather than excluding evidence that should have been admitted, the trial court admitted much evidence that should have been excluded. The trial court's error thus inured to Petitioner's benefit, rather than to his detriment, by giving Petitioner more opportunity than he was entitled to, to show that the verdict was infirm. The testimony the trial court admitted concerning the jurors' "dew rag" jokes and use of African-American vernacular was inadmissible under Rule 606(B), and should not have been considered. The testimony the trial court admitted concerning Juror Downs' investigation was inadmissible under Rule 606(B), and should not have been considered. Even with the extra evidence the trial court considered, Petitioner cannot show that juror misconduct so severely

tainted his trial as to render his conviction and sentence infirm.

Petitioner's arguments to the contrary are unconvincing. Petitioner argues that he should have been entitled to inquire further into the jurors' biases as expressed while they were sequestered and during deliberations. However, the controlling rule of evidence, known as the *aliunde* rule, expressly states that evidence of statements made during the course of jury deliberations is not admissible. Ohio R. Evid. 606(B). The *aliunde* rule further states that a juror may testify as to extraneous information and outside influences – which might include Juror Downs' improper investigation – only after some outside evidence, external to the jury itself, has been presented. *Id.* In this case, the only evidence of the jurors' conduct was taken from the jurors themselves. The trial court's refusal to permit Petitioner to inquire further into the jurors' deliberations was proper.

Petitioner's twenty-fourth challenge to his conviction and sentence is meritless. No evidentiary hearing is warranted.

C. Claims Arising out of Conduct of Trial

1. Denial of Expert Assistance

In claim number one, Petitioner asserts he was denied his right to investigative and expert assistance in preparing and presenting his defense because the trial court refused to authorize the expenditure of funds for experts in the areas of: soil analysis; shoe print analysis; blood analysis; DNA analysis; the reliability of eyewitness identification;

homicide investigation; mass media; and mental health. He further argues that the Supreme Court of Ohio used a too-deferential standard in its review of the trial court's denial of Petitioner's requests for the aforementioned experts. Petitioner has also moved for an evidentiary hearing on this claim.

In *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 80 L. Ed. 2d 123 (1984), the Supreme Court held that an indigent defendant has a right to the expert assistance of a psychiatrist where his sanity at the time of the offense will be a significant factor at trial. Although *Ake* itself does not expressly so hold, federal courts have construed *Ake* generally to require the state to provide an indigent defendant with any expert services that are necessary to present an adequate defense. *United States v. Deering*, 179 F.3d 592, 597 (8th Cir. 1999); *Rogers v. Gibson*, 173 F.3d 1278, 1286-87 (10th Cir. 1999); *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). The defendant has the burden of making a particularized showing that such assistance is necessary. The state is not required to provide expert assistance where the defendant offers only undeveloped assertions that the requested assistance would be beneficial. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1, 105 S. Ct. 2633, 2637 n.1, 86 L. Ed. 2d 231 (1985). The Court considers three factors in determining whether Petitioner was constitutionally entitled to the requested assistance: (1) the effect on Petitioner's interest in the accuracy of the criminal proceeding if the requested assistance is not provided; (2) the burden on the state if the assistance is provided; and (3) the probable value of the assistance sought and the risk of error in the

proceeding if such assistance is not provided. *Ake*, 470 U.S. at 77-79, 105 S. Ct. at 1093-94.

Petitioner first argues that the trial court erred by refusing to approve funds for a soils expert who would have testified that no soil from the crime scene was found on Petitioner's person, clothing, or shoes after the murder. That argument lacks merit. Petitioner does not dispute that the state never argued that soil from the crime scene was found on Petitioner's person, clothing, or shoes after the murder, and that Petitioner repeatedly made that point during the trial. Since the jury was, in fact, presented with uncontradicted evidence at trial that no soil from the crime scene was found on Petitioner's person, clothing, or shoes, Petitioner has not demonstrated any way in which a soils expert would have affected the accuracy or fairness of his trial.

Petitioner next argues that the trial court erred by refusing to approve funds for a shoe print expert who would have testified that the Nike shoe prints in the victim's car could not positively be identified as belonging to Petitioner. That argument lacks merit. Petitioner does not dispute that the state conceded at trial that it could not positively identify the shoe prints as belonging to Petitioner. Furthermore, the shoe prints were relevant for two purposes: (1) to demonstrate that Petitioner was in the victim's car; and (2) to demonstrate that a struggle occurred in the victim's car. As to the first point, Petitioner admits that he was in the victim's car on the date in question. As to the second point, the question of whether the shoe prints belonged to

Petitioner or to the victim is irrelevant to the jury's determination that a struggle occurred in the car. Petitioner has not demonstrated any way in which a shoe print expert would have affected the accuracy or fairness of his trial.

Petitioner next argues that the trial court erred by refusing to approve funds for blood and DNA experts. That argument lacks merit. The record indicates that two DNA experts were available to Petitioner, and performed independent DNA testing at Petitioner's request. Furthermore, Petitioner admits that he engaged in sexual relations with the victim on the date in question, and that the semen found in the victim's panties and vagina is his. Petitioner has not demonstrated any way in which an additional blood or DNA expert would have affected the accuracy or fairness of his trial.

Petitioner next argues that the trial court erred by refusing to approve funds for an expert on the issue of the reliability of eyewitness identification. That argument lacks merit. No federal court has ever held that a defendant has a right to an appointed expert on the reliability of eyewitness identification. Indeed, it would not have been error for the trial court to exclude the testimony of an expert on the reliability of eyewitness identification even if Petitioner had engaged such an expert using his own funds. As long as the defendant has an adequate opportunity to cross-examine eyewitnesses, the exclusion of expert testimony on the reliability of eyewitness identification is not error. *Moore v. Tate*, 882 F.2d 1107, 1110-11 (6th Cir. 1989); *accord United States v.*

Hall, 165 F.3d 1095, 1103 (7th Cir. 1999); *United States v. Harris*, 995 F.2d 532, 533 (4th Cir. 1993). Furthermore, the record indicates that Petitioner did, in fact, present the testimony of an expert on the reliability of eyewitness identification. (Tr. at 3193-3234.) Petitioner has not demonstrated any way in which an appointed expert on the reliability of eyewitness identification would have affected the accuracy or fairness of his trial.

Petitioner next argues that the trial court erred by refusing to approve funds for a homicide investigation expert to advise counsel about the proper protocol to be followed in homicide investigations. That argument lacks merit. The trial court did, in fact, authorize funds for an expert investigator. Petitioner presented at trial all admissible evidence relating to his theory that the murder was committed by someone else. He has not demonstrated any way in which a homicide investigation expert would have affected the accuracy or fairness of his trial.

Petitioner next argues that the trial court erred by refusing to approve funds for a mass media expert to assist counsel in demonstrating that a change of venue was necessary because the jury pool had been tainted by pre-trial publicity. That argument lacks merit. The trial court conducted a thorough investigation into the amount of exposure potential jurors had had to the case, and correctly determined that a change of venue was not necessary. Petitioner has not demonstrated any way in which a mass media expert would have affected the accuracy or fairness of his trial.

Finally, Petitioner argues that the trial court erred by refusing to approve funds for a forensic psychologist or mitigation specialist to develop mental health defenses and themes for mitigation during the penalty phase. That argument lacks merit. First, the trial court was not required to appoint a mitigation expert in the context of this case. *Ake* requires a court to appoint a mental health expert at the sentencing phase of a capital trial only if the prosecution introduces evidence that the defendant poses a continuing threat, and the mental health expert's testimony is needed to rebut that evidence. *Clayton v. Gibson*, 199 F.3d 1162, 1175 (10th Cir. 1999); *Ramdass v. Angelone*, 187 F.3d 396, 409 (4th Cir. 1999); *White v. Johnson*, 153 F.3d 197, 203-04 (5th Cir. 1998); *Bannister v. Armontrout*, 4 F.3d 1434, 1441, 1442 n.10 (8th Cir. 1993). In this case, the state did not present any evidence of Petitioner's future dangerousness. Therefore, the court's denial of a mental health expert at the sentencing phase would not constitute an *Ake* violation.

Second, the trial court did, in fact, approve funds for a psychiatric evaluation of Petitioner, even though one was not constitutionally required. Petitioner complains that the trial court did not approve funds for the appointment of a mental health specialist of Petitioner's choice, but the constitution does not give an indigent defendant "the right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83. All that is required is that the state provide the defendant with access to a competent psychiatrist.

In this case, Petitioner's two appointed attorneys and an appointed investigator had access to a plethora of information concerning Petitioner's background and mental state. Petitioner was evaluated by a psychiatrist, Dr. Joseph Spare, who provided a five-page psychiatric evaluation and an MMPI evaluation, and testified on a video deposition that Petitioner would be unlikely to be a repeat offender. The mental evaluation produced the information that Petitioner has a verbal I.Q. of 81, a performance I.Q. of 89, and a full scale I.Q. of 83. Petitioner's counsel and investigator had access to academic records provided by Harding High School and the Marion City School System, which records contained the information that Petitioner was a chronic truant, with poor grades, and that his schooling was interrupted for three six-month placements in Ohio Youth Commission facilities. Petitioner's counsel and investigator had access to Marion County Children Services Board records which indicated that Petitioner was physically abused by his parents.

Petitioner's counsel and investigator also had access to records provided by the Marion County Sheriffs Department, Ohio Adult Parole Authority, and Ohio Department of Rehabilitation and Corrections, which indicated an extensive history of criminal convictions and parole violations. The record before this Court does not contain a complete listing of Petitioner's criminal history. The record does indicate, however, the following:

- A burglary conviction in 1984
- A drug trafficking charge in 1991

- Other unspecified drug offenses
- Multiple unspecified parole violations
- Brandishing a gun with an ex-girlfriend on July 7, 1991
- Rape committed on October 7, 1992
- Resisting arrest on November 24, 1992
- Burglary on January 18, 1994
- Petitioner was incarcerated for all but nineteen months of the ten years between his 1984 burglary conviction and the time of the murder trial. He was never released for longer than nine months without violating his parole.

At trial, Petitioner and his counsel made a strategic decision not to present any mitigation evidence arising out of Petitioner's background, because the presentation of such evidence would have opened the door to the prosecution to rebut that evidence by proving that Petitioner had a significant history of violent criminal conduct, including prior rape and firearms offenses.

Petitioner now challenges that decision, and argues that his counsel failed to conduct an adequate social history. Petitioner has provided additional information about his personal background along with his petition for habeas corpus. Since the record before this Court does not contain all of the records made available to his trial counsel, it is unclear how much of the following information trial counsel would have known. Petitioner has provided that he was born into a home characterized by drug and

alcohol abuse, and physical violence. His father beat both his mother and him on a regular basis. Petitioner began pilfering from his parents' marijuana stash in third or fourth grade, and began dealing drugs in sixth grade. During that period, Petitioner's father was incarcerated for drug dealing. As an adolescent, Petitioner frequently ran away from home for days at a time.

Petitioner's wife, whom he married in 1991, has provided an affidavit stating that Petitioner was a thoughtful husband and was never violent to her.

On this record, Petitioner's counsels' decision not to present mitigation evidence was objectively reasonable. His significant criminal history far outweighed any possible mitigating effects of his unfortunate childhood. None of the suggested mitigating evidence reduces Petitioner's culpability for the murder or the unrelated string of violence that preceded it. *See Scott*, 2000 WL 390525, at *24. Nor has Petitioner demonstrated that a forensic psychologist or mitigation specialist would have uncovered any evidence that would likely have produced a different outcome at trial.

Petitioner's first challenge to his conviction and sentence is meritless. No evidentiary hearing is warranted.

2. Race Discrimination

In claim number ten, Petitioner asserts he was denied his right to a fair trial because his trial was infested with racial discrimination. Petitioner has also moved for an evidentiary hearing on this claim.

The Court has already rejected most of Petitioner's race discrimination claims in its previous discussion of Petitioner's claims numbered eight, twelve, and twenty-one. The Court rejects those claims for the reasons previously given.

In addition to those claims, Petitioner argues that Ohio's death penalty system is inherently racially biased, because African-Americans are disproportionately represented on Ohio's death row, and sixty percent of African-Americans on Ohio's death row are there for having killed white persons. That argument lacks any merit. The Supreme Court has expressly rejected the argument that the disproportionate representation of a particular race on death row gives rise to a presumption of race discrimination in any given case. *McClesky v. Kemp*, 481 U.S. 279, 292-97, 107 S. Ct. 1756, 1767-70, 95 L. Ed. 2d 262 (1987). Nor does a showing that murderers of white victims are disproportionately likely to receive the death penalty give rise to such a presumption. *Id.*

Petitioner's tenth challenge to his conviction and sentence is meritless. No evidentiary hearing is warranted.

3. Admission of Photographs of Victim

In claim number fourteen, Petitioner claims that he was denied due process because of the admission into evidence of inflammatory color photographs of the murder victim. He claims that the prejudicial impact of those photographs outweighed their probative value. That argument lacks merit. The trial court has discretion to admit a

relevant photograph unless it is so gruesome or inflammatory that its prejudicial impact substantially outweighs its probative value. *United States v. Ingle*, 157 F.3d 1147, 1153 (8th Cir. 1998); *United States v. Sides*, 944 F.2d 1554, 1562-63 (10th Cir. 1991). The eight 3-1/4 x 5" photographs challenged by Petitioner in this case were relevant not only to show how the victim died, but also to corroborate the testimony of the law enforcement personnel who testified, to illustrate the officers' testimony which described the crime scene and the location and condition of the victim's body, to show the nature and extent of the injuries to the victim, and to assist the jury in understanding the testimony of the medical examiner. These are all legitimate purposes for which victim photographs are routinely admitted. *See, e.g., Woods v. Johnson*, 75 F.3d 1017, 1039 (5th Cir. 1996). The trial court did not abuse its discretion by admitting the crime scene and autopsy photographs.

Petitioner's tenth challenge to his conviction and sentence is meritless.

4. Admission of Transcripts of Police Interview

In claim number fifteen, Petitioner claims that the jury was provided with transcripts of statements Petitioner made to the police, which statements were transcribed in such a manner as to suggest racial stereotypes. Specifically, Petitioner objects to the use of transcriptions that preserved his nonstandard English phonology, such as "wadn't" for "wasn't" and "truf" for "truth."

Petitioner did not object to the transcripts at trial. Thus, the claim is procedurally defaulted unless Petitioner can establish cause and prejudice, *i.e.*, that his counsel's failure to object to the transcripts was so glaringly deficient that it amounted to ineffective assistance of counsel, and whether he has shown prejudice attributable thereto. If Petitioner cannot show cause and prejudice, his claim is procedurally defaulted.

Petitioner has not made the necessary showing. Although Petitioner styles this claim as an objection to "inaccurate" transcripts, his real objection to the transcripts seems to be that those transcripts are *too* accurate. Petitioner does not deny that he used nonstandard African-American English throughout the two transcribed interviews, and that the transcript reflects his speech faithfully. In fact, Petitioner has not identified a single phonetically inaccurate rendering of his speech in the entire transcription.

Petitioner complains that a jury reading the transcripts would be led to believe that they were reading "Uncle Remus" tales, thereby creating an atmosphere of racial prejudice. That complaint lacks merit. The jury heard Petitioner speak, both at the trial and in the taped interviews; they were familiar with his style of speech. There were no material differences between the tapes and the transcripts. This Court is aware of no case in which the admission of an *accurate* transcription of a recorded statement was held to be error on that ground, and will not so hold in this case.

Nor did the trial court err by allowing the jury to take the transcripts with them into the jury room. The jury was properly instructed that the transcripts were merely an aid to facilitate listening to the tapes.

Petitioner's fifteenth challenge to his conviction and sentence is meritless.

5. Refusal to Admit "Bad Acts" Evidence of Victim's Husband

In claim number sixteen, Petitioner claims that the trial court inappropriately prevented him from presenting evidence that the victim's husband had a history of violence in order to show that the murder had, in fact, been committed by the victim's husband.

At trial, Petitioner's theory of the case was that the victim's husband, Chris Dennis, had murdered the victim, either (a) in a jealous rage after learning that Petitioner and the victim were having an affair or (b) in order to gain the proceeds of her life insurance policy. Petitioner proffered, and was allowed to present, evidence of Chris Dennis' heavy drinking and his violent tendencies, including two incidents of wife-beating. Petitioner presented evidence that Chris Dennis had threatened to kill his wife on the day she disappeared. Petitioner also presented evidence about the victim's life insurance policy.

The trial court did not admit all of the evidence Petitioner proffered. The trial court refused to admit evidence that Chris Dennis had previously committed physical assaults on Chris Lyons, Ben

Audin, and Annette Dennis. The proffered evidence was excluded on the basis of Ohio Rule of Evidence 404(B), which provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

Petitioner does not dispute that the plain language of Rule 404(B) mandates the exclusion of the proffered evidence. He argues, however, that the evidence should have been admitted because Chris Dennis was not on trial. That argument lacks merit. The evidence rule states that "bad acts" evidence is "not admissible to prove the character of *a person* in order to show that he acted in conformity therewith." (Emphasis added.) The rule's application is not limited to criminal defendants, to victims or witnesses, or to any other subcategory of persons. It applies to all persons. The evidence was properly excluded.

Petitioner's sixteenth challenge to his conviction and sentence is meritless.

6. Prosecutorial Misconduct

In claim number seventeen, Petitioner claims that the prosecutor engaged in prosecutorial misconduct during cross-examination of Petitioner and during closing arguments both at the guilt phase and the sentencing phase of the trial, and that the trial court improperly failed to give a curative instruction. Petitioner *did not object* to the prosecutor's conduct at trial. Thus, the claim is procedurally defaulted unless Petitioner can establish cause and prejudice, *i.e.*, that his counsel's

failure object to the prosecutor's conduct was so glaringly deficient that it amounted to ineffective assistance of counsel, and whether he has shown prejudice attributable thereto. If Petitioner cannot show cause and prejudice, his claim is procedurally defaulted. Petitioner has identified several sections of the trial transcript which, he argues, demonstrate prosecutorial misconduct.

First, Petitioner objects to a portion of Petitioner's cross-examination that addressed the DNA evidence presented in the case. When Petitioner was first questioned by the police, he stated that he had met Robin Dennis only on a few occasions, and only when she was with her husband. He adamantly denied having sexual relations with her. During the State's case in chief, the Prosecutor cross-examined the DNA expert in detail on the accuracy of the DNA testing, which testing demonstrated conclusively that Petitioner's semen was in the victim's vagina and on her panties. When Petitioner took the stand, he testified that he had engaged in consensual sexual relations with the victim on the morning of the day she died. The prosecutor cross-examined him about that testimony as follows:

> Q: You were on for three hours, and the most important piece of evidence that ties uniquely Maurice Mason to Robin Dennis' raped and murdered body, you just spent thirty seconds saying, "Yeah, I had consensual intercourse with her at Ricky McDuffie's house at 10:30 a.m. on

the eighth." That was your entire testimony about that, wasn't it?

A: Yeah, I think it was.

* * *

Q: Well, let me ask you this. Why is it when this case started, you were denying having sexual intercourse with Robin Dennis?

A: I'm married. She's married.

* * *

Q: And so that's the reason that you told Deputy Potts that, "I didn't even know Robin. I was never alone with her." Is that the reason you told him that?

A: Like I said, we was having an affair. And yes, that's what I told him.

Q: Is that the reason?

A: Yeah. I'm married, and she's married. I mean -

Q: Is that the same reason that when this case started, in order to contest the DNA results, you had your attorneys do independent DNA testing to see if our DNA results were right?

(Tr. at 3654-56.) Petitioner claims that the question regarding DNA testing both constitutes an inappropriate attack on Petitioner's defense strategy, and violates his Fifth Amendment privilege against self-incrimination because it is a comment on Petitioner's decision to exercise his constitutional rights.

That argument lacks merit. Although a prosecutor may not comment on a criminal

defendant's decision not to testify in a way that invites an inference of guilt, once the defendant , does take the stand, his testimony may be assailed and his credibility impeached the same as any other witness. *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965); *accord Portuondo v. Agard*, 120 S. Ct. 11 19, 1124-25 (2000). That is what happened in this case. It was not improper for the prosecutor to point out that Petitioner had changed his story between his initial interviews with the police and the time of trial. It was not improper for the prosecutor to point out that Petitioner had failed to present any challenge at trial to the state's determination that the semen in dispute was Petitioner's. Petitioner's trial counsel's failure to object to the question about DNA testing did not rise to the level of ineffective assistance of counsel, and the objection is therefore procedurally defaulted.

Next, Petitioner objects to a portion of Petitioner's cross-examination that addressed Petitioner's claim, which he made for the first time on direct examination, that he had met the victim for the first time while working at the Popcorn Festival on September 11, and had become sexually involved with her that night. Petitioner also stated that he had returned to the Popcorn Festival at 8:00 the next morning. The prosecutor cross-examined him about that testimony as follows:

> Q: So you're with her continuously, let's say, from what, 2:00 a.m. to 8:00 a.m.? I mean is that -
>
> A: Somewhere around up in there, yeah.

Q: And then you have to go back to the Popcorn Festival to recommence your duties there?

A: Correct.

* * *

Q: Oh, so somebody would have some records then if you're on a clock?

A: Yeah, sure.

Q: Did you happen to bring those with you, or your attorney search those?

A: How was I supposed to get 'em? I have been locked up for the last seventeen months.

Q: Geez, you have got all these other records here.

A: I didn't bring none of those records, sir.

Q: You didn't ask your attorney to get those, either, then?

(Tr. at 6376-77.) Petitioner claims that the Prosecutor's questions concerning the lack of records was improper because it ridiculed the defense's theory. That argument lacks merit. It was not improper for the Prosecutor to impeach Petitioner by demonstrating that he had failed to present documentary evidence that should have been readily available to corroborate his claim. *United States v. Clark*, 932 F.3d 965, 968 (6th Cir. 1993). Petitioner's trial counsel's failure to object to the question about work records from the Popcorn Festival did not rise to the level of ineffective assistance of counsel, and the objection is therefore procedurally defaulted.

Next, Petitioner objects to several portions of the Prosecutor's guilt-phase closing arguments, in

which the Prosecutor (a) described the defense's theory of the case as "preposterous;" (b) suggested that Petitioner had changed his story about a having preexisting sexual relationship with the victim only in response to the strength of the DNA evidence presented by the prosecution; and (c) suggested that the defense was trying to take them "far afield" and to "cloud the issues." None of those statements constitutes prosecutorial misconduct, as long as they can reasonably be inferred from the evidence presented at trial. It is not improper for a prosecuting attorney to point out discrepancies between the accused's pretrial statements and the statements he makes at trial. Nor is the use of the word "preposterous" unduly inflammatory. *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999) (not improper for prosecutor to assert that defendant is lying); *United States v. Shoff*, 151 F.3d 889, 893 (8th Cir. 1998) (not improper for prosecutor to call defendant a "con man" and "liar"); *Williams v. Borg*, 139 F.3d 737, 744-45 (9th Cir. 1996) (not improper for prosecutor to call defendant "stupid" and to refer to defense counsel's argument as "trash"); *United States v. Reliford*, 58 F.3d 247, 250 (6th Cir. 1995) (not improper for prosecutor to characterize defendant's testimony as "unbelievable," "ridiculous," and "a fairy tale"); *United States v. Davis*, 15 F.3d 1393, 1402-03 (7th Cir. 1994) (not improper for prosecutor to refer to defendant's case as "trash," "hogwash," and "garbage"); *compare Kellogg v. Skon*, 176 F.3d 447, 451-52 (8' Cir. 1999) (improper for prosecutor to call defendant "monster," "sexual deviant," and "liar," but no prejudice shown where weight of evidence against defendant was heavy);

United States v. Collins, 78 F.3d 1021, 1039-40 (6th Cir. 1996) (improper for prosecutor to state that defense counsel deserved an Academy Award for keeping a straight face when he made his arguments, but no prejudice shown where weight of evidence against defendant was heavy). Petitioner's trial counsel's failure to object to those portions of closing argument did not rise to the level of ineffective assistance of counsel, and the objection is therefore procedurally defaulted.

Next, Petitioner claims that the Prosecutor engaged in improper "vouching" on two separate occasions during guilt-phase closing argument. Improper vouching occurs when an attorney supports or attacks the credibility of a witness by indicating a personal belief or disbelief in the witness's credibility. Usually, vouching involves either blunt assertions (*i.e.*, "I believe the witness is honest"), or comments that imply that the attorney has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses. *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999). Vouching is improper because it invades the province of the jury by inviting them to convict the defendant on a basis other than a neutral independent assessment of the record proof. *Caldwell v. Russell*, 1 8 1 F.3d 731, 737-78 (6th Cir. 1999).

First, Petitioner complains about the Prosecutor's description of the testimony of defense witnesses Troy and Shannon Elliot, which was as follows:

> Now, the Defendant over there knew that, "Gee, this is a little bit of a problem," you

know, "that I don't have any corroboration of [a consensual sexual relationship with Robin Dennis]."

And so who do they trot into this court to try to corroborate this ongoing relationship, but the husband/wife duo of Troy and Shannon Elliott.

I would suggest to you that Troy, if we have a category here for who is the most unbelievable witness, and there is a lot of candidates in this case, Troy and Shannon Elliott are at least nominees for the finalists in that category.

Troy Elliott sits up here on this witness stand, and he's questioned by Mr. Coulter, and he says, "Yeah, there were two times that I saw the Defendant and this Robin girl together. Once at Taco Bell, and once driving around town. . . ."

And then, you know, I get to question him. . . . " Did you know Robin Dennis?"

"No."

"Had you ever met Robin Dennis before?"

"No."

"How do you know it was Robin Dennis?"

"Oh, I don't know that. It was a blonde-haired girl is all I can say."

"Well, why are you referring to her as this Robin girl?

"Well, that's what Mr. Coulter said."

And then I said, "Well, okay. Well, how do you know that it was them?"

"Well, I recognized the car."

"Well, when did you - how did you recognize the car?"

"Because after she came up missing, I saw a picture of the car in the Marion Star."

* * *

That would strain credibility even if there really had been a picture of the car in the Marion Star. But you know the truth, because we brought the Assistant Editor of the Star into court who said, "No, we have never put a picture of the Marion Star - a picture of that car in the Marion Star."

Where do they come up with these people? Well, you know that the common thread is? Troy Elliott's known this Defendant for sixteen years. And so who follows him into court right after Troy? His wife, Shannon. [Shannon Elliott stated that she had seen Robin Dennis with Petitioner and recognized Dennis from playing softball with her ten years earlier.]

"How old was Robin?"

"She was nine or ten."

"Had you seen Robin since the softball games in 1983."

"No."

* * *

How in good conscience can the same defense team which brings in an expert witness on eyewitness identification, who wants to criticize the statements that Mr. Forester and Mr. Lautenslager made and recorded within two days, how can they in

> good conscience believe these witnesses are testifying to things they think they saw long ago? Recognitions based on seeing someone when they're nine years old?
>
> Sometimes it's a measure of how weak and how preposterous the Defendant's case is, based on how far afield they try to take you with their arguments."

(Tr. at 3943-49.) Petitioner claims that the Prosecutor both improperly expressed an opinion on Troy and Shannon Elliotts' veracity, and improperly attacked defense counsel's strategy in presenting the Elliotts.

That argument lacks merit. The Prosecutor did not at any time improperly "vouch" for Troy or Shannon Elliott by stating that he, personally, did not believe them. Rather, he merely stated that their testimony was not credible. The distinction is important. It is not improper for counsel to state during closing argument that the testimony of a particular witness is not credible, particularly where, as here, counsel backs up his statement with numerous specific citations to the record. Petitioner's trial counsel's failure to object to that portion of closing argument did not rise to the level of ineffective assistance of counsel, and the objection is therefore procedurally defaulted.

Petitioner also complains that the Prosecutor improperly vouched for the police during the rebuttal phase of closing argument, by stating that he was:

> a little disturbed by how - I think the Officers in this case have been unfairly

> attacked and criticized. You know, I will take the criticism. I will take the attacks on myself. That's fine. But these Officers go out there, risk their lives, serve the public, and in this case I think did an outstanding job.

(Tr. at 4131.) The Ohio Supreme Court found that the Prosecutor did improperly vouch for the police, but that prejudicial error did not result therefrom, "particularly in light of defense counsel's repeated criticism of the police investigation. Where a prosecutorial statement not supported by admitted evidence is short, oblique, and justified as a reply to defense arguments and elicits no contemporaneous objection, there is no prejudicial error." *Mason*, 82 Ohio St. 3d at 162, 694 N.E.2d at 952.

Federal courts in the Sixth Circuit analyze claims of improper prosecutorial vouching during closing argument according to the test set forth in *United States v. Carroll*, 26 F.3d 1380, 1384-90 (6th Cir. 1994). First, the Court must determine whether the conduct was improper. In this case, the Prosecutor stated that the investigating officers "did an outstanding job," but lacked evidentiary support therefor. The statement was improper.

Having determined that the statement was improper, the Court next must determine whether the conduct was flagrant. In making that determination, the Court considers: (1) whether the comments would tend to mislead the jury or prejudice the defendant; (2) whether the comments were isolated or extensive, and (3) whether the comments were made deliberately. 26 F.3d at 1385. Vouching is less likely to mislead the jury or

prejudice the defendant when the prosecutor's comments were invited by defense counsel's argument. *United States v. Collins*, 78 F.3d 1021, 1039-40 (6th Cir. 1996).

In this case, the Prosecutor's improper comment was made as a direct response to argument by defense counsel; thus, it was unlikely to mislead the jury. The comment was isolated – a single improper comment in a month-long trial. There is no evidence that the comment was made deliberately to influence the jurors' deliberations. Accordingly, the Court finds that counsel's conduct was not flagrant.

Where the improper conduct was not flagrant, a finding of prejudicial error is warranted only where: (1) the proof against the defendant was not overwhelming; (2) opposing counsel objected to the conduct; and (3) the trial court failed to give a curative instruction. *Carroll*, 26 F.3d at 1384-90. Petitioner has not demonstrated prejudicial error in this case. First, the proof against Petitioner at trial was overwhelming. The evidence taken from the crime scene, including the victim's position, bruises, and lack of clothing, along with the semen in the victim's vagina and panties, established that she had been raped and murdered. DNA evidence established conclusively that the victim had had sexual relations with Petitioner, and with no one else, within twelve hours of her death. Several eyewitnesses saw an individual matching Petitioner's description at the crime scene near the time of the murder. Second, no contemporaneous objection was made to the Prosecutor's argument.

The Prosecutor's improper vouching for the investigative officers does not warrant reversal.

Next, Petitioner complains that the Prosecutor argued with defense counsel during the examination of Deputy Lautenschlanger, Detective Potts, Chris Dennis, and during the defense case, on repeated occasions. The Court has reviewed every alleged instance of impropriety. The vast majority of the instances cited by Petitioner involve routine evidentiary objections, properly made, which were usually resolved in the state's favor. Many of the transcript pages Petitioner cites in support of his contention contain nothing but unobjected trial testimony. None of the pages cited by Petitioner evince even marginally improper conduct on the part of the Prosecutor. Petitioner claims that the trial court cautioned both counsel twice, at pages 2653 and 3789; the record does not support that factual contention.

To the contrary, the trial court expressly stated that the Prosecutor had behaved professionally during the trial. At one point during the prosecution's case in chief, *out of the presence and hearing of the jury*, the trial judge chastised defense counsel for complaining about the Prosecutor's conduct:

> The Prosecuting Attorney, in my opinion, has never, at any time in this entire case, acted in anything but in a proper manner and as a Prosecuting Attorney should act in representing the State in this case.
>
> The times that you [defense counsel] have continued to get up and accuse him of

untoward decorum in this courtroom is not correct. I have never seen him, at any time – those statements are you are an attempt to make a record in this case, and this Court's going to do anything that he can to protect that record. That there was never, at any time, where the Prosecutor has acted otherwise than in a proper manner.

* * *

This Court was a trial attorney for thirty years before taking the bench, and I have been on this bench for twelve years. This is the third aggravated murder case. I have had countless other murder cases before me. Many, many felony cases that have been tried in this courtroom, and there is a lot that goes on in the heat of battle between attorneys. And you should recognize that.

But Mr. Slagle's not making any sly remarks or making anything other than saving his objections, which I have to rule on as to whether they're proper or improper, the same as your objections.

Now, I want you to get on with this case. And as I stated, that you're going to be given as much leeway as I can. But I'm not going to tolerate you saying that the Prosecutor is getting away with this and getting away with that. I don't permit that, and – and I want the record to show that there hasn't been anything, in my opinion, in the way of misconduct, or I would have corralled him long ago in this case.

(Tr. at 2788-91.) Petitioner's complaints about the Prosecutor's conduct during the evidentiary portion of the case lacks merit.

Next, Petitioner objects to several portions of the Prosecutor's sentencing-phase closing arguments. Petitioner first argues that several of the Prosecutor's statements constitute improper vouching, to-wit: "what I think we will prove during this stage of the proceedings is that the defense really has no substantial mitigating evidence," (tr. at 4235), and "I think, having heard the evidence they presented, I think you would agree that, and I expect you will agree, that there really wasn't any substantial mitigating evidence," (tr. at 4300). That argument lacks merit. The Prosecutor was merely commenting on possible inferences from the evidence. It is not improper for counsel to comment on the weight of the evidence presented by the opposing side.

Petitioner argues that the Prosecutor's statement: "I would like to discuss with you in a little detail . . . how you should go through this weighing process," (tr. at 4300), improperly invited the jury to rely on his personal experience as to how they should carry out their jobs as jurors in analyzing the evidence. That argument lacks merit. The Prosecutor's comment was not improper. At no time during the penalty-phase closing arguments did the Prosecutor identify any consideration that was not fairly supported by both the law and the evidence.

Petitioner argues that the Prosecutor improperly described the defense's evidence as "farfetched." (Tr. at 4337.) As discussed above, that

characterization of Defendant's arguments was not improper.

Petitioner argues that the Prosecutor improperly commented on his decision to exercise his right to make an unsworn statement by stating: "The only other evidence that came forth today on guilt or innocence was the Defendant stood up here, or sat here on an unsworn statement, a statement which isn't under oath, a statement which I'm not allowed to cross-examine about, and said, 'I didn't commit this crime.'" (Tr. at 43 12.) It is not improper for a prosecutor to point out that an unsworn statement by an accused was not made under oath and was not subject to cross-examination. *Byrd v. Collins*, 2000 WL 351748, at *40, (6th Cir. Apr. 6, 2000); *Porter v. Estelle*, 709 F.2d 944, 959 (5th Cir. 1983); *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982).

Petitioner argues that the Prosecutor misled the jury by suggesting that the murder itself was an aggravating circumstance that would allow imposition of the death penalty. That contention is factually inaccurate. The Prosecutor made clear during closing argument that the aggravating circumstance was murder "in the course of a rape." (Tr. at 4340.) That was a correct statement of the law as applied to this case.

Petitioner argues that the Prosecutor misled the jury by suggesting that the mitigating factors Petitioner offered during the sentencing phase – *i.e.*, good behavior in jail, artistic ability, and the pleas of Petitioner's relatives – were not sufficient to outweigh the aggravating circumstance. That argument fails. It is not improper for a Prosecutor to

argue that mitigating factors offered by a capital defendant are of little merit.

Petitioner complains that the Prosecutor suggested that the jury "compare" the aggravating circumstances against the mitigating factors in determining whether to impose the death penalty. The controlling statute specifies that the death penalty will be imposed if the jury finds that "the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." Ohio Rev. Code § 2929.03(D)(2). The only way to determine whether the aggravating circumstances outweigh the mitigating factors is to compare them. For the prosecutor to have done so was proper.

Petitioner's seventeenth challenge to his conviction and sentence is meritless.

7. Sufficiency of the Evidence

In claim number nineteen, Petitioner claims that the state did not prove the aggravating circumstance of rape beyond a reasonable doubt because there was no evidence of genital trauma. That argument lacks merit. The medical expert testimony was that genital trauma is the exception, rather than the rule, in the rape of an adult woman. (Tr. at 155 1-52,3387.) There was a plethora of other evidence from which a jury could reasonably determine that the victim had been raped.

Petitioner does not deny that there was sufficient evidence of sexual penetration. There was also significant evidence that the sexual contact was not consensual. There was evidence of a struggle in

and around Dennis' car. When Dennis' body was found, her jeans and panties were positioned around her ankles and lower leg, inside out, as though they had been removed in a forcible struggle. Dennis had been strangled. There were bruises on Dennis' head, face and body. That constitutes sufficient evidence to establish, and for the jury to find, the aggravating circumstance of rape beyond a reasonable doubt.

Petitioner's nineteenth challenge to his conviction and sentence is meritless.

D. Claims Arising out of Sentencing

1. Facial Challenges to Constitutionality of Ohio's Death Penalty Statute

In claims number five, six, seven, eight, twenty-three, and twenty-five, Petitioner raises various facial challenges to the constitutionality of Ohio's death penalty scheme. He has moved for an evidentiary hearing on his sixth claim, which is that death by electrocution constitutes cruel and unusual punishment. Petitioner's claims lack merit. The constitutionality of Ohio's death penalty scheme has recently been upheld by the Sixth Circuit. *Scott*, 2000 WL 390525, at *29; *Byrd v. Collins*, __ F.3d __ No. 96-3209, 2000 WL 351748, at *45 (6th Cir. Apr. 6, 2000).

Nor is an evidentiary hearing required on Petitioner's claim that electrocution constitutes cruel and unusual punishment. The statute gives Petitioner the option of choosing lethal injection. Ohio Rev. Code § 2949.52(B)(1).

Petitioner's fifth, sixth, seventh, eighth, twenty-third, and twenty-fifth challenges to his conviction and sentence are meritless.

2. Challenge to Constitutionality of Ohio's Death Penalty Statute as Applied

In claim number twenty-three, Petitioner also claims that imposition of the death penalty in this case is so disproportionate to the offense as to violate the Eighth Amendment, and asks for an evidentiary hearing on that claim. That argument lacks merit. Petitioner is guilty of a vile, heinous crime, with an aggravating circumstance that American courts have always found sufficient to justify imposition of the death penalty. Petitioner presented no substantial mitigating evidence at the sentencing phase. Nor does it appear that any significant mitigating factors exist in his case, whether presented at trial or not. There is nothing disproportionate about the penalty imposed in this case, given the nature of the crime which the jury found Petitioner committed.

Petitioner's twenty-third challenge to his conviction and sentence is meritless. No evidentiary hearing is warranted.

E. Claim Arising out of Appeal

In claim number four, Petitioner asserts that the Ohio Supreme Court erred by deferring to the jury and trial court's determination that the death penalty was proper in this case. That argument lacks merit. The Ohio Supreme Court conducted a detailed review of Petitioner's claims, ultimately producing a detailed and thorough opinion in which they addressed each of Petitioner's claims on the

merits. The Ohio Supreme Court also conducted a proper proportionality review of Petitioner's sentence, although such review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S. Ct. 871, 879-80, 79 L. Ed. 2d 29 (1984); *McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996).

Petitioner's fourth challenge to his conviction and sentence is meritless.

F. Claims of Ineffective Assistance of Counsel

In claim number two, Petitioner produces a forty-one page, shotgun-style listing of errors he claims were committed by his counsel at trial and on appeal. He has also moved for an evidentiary hearing on his claims.

In order to make out a claim of ineffective assistance of counsel, Petitioner must meet the two-part test set out in *Strickland v. Washington*, 466 U.S. 668, 687-97, 104 S. Ct. 2052, 2064-70, 80 L. Ed. 2d 674 (1984). First, Petitioner must show that his attorneys' performance was so far below the range of competence demanded of attorneys in criminal cases that they were not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. There is a strong presumption that counsel's performance falls within the "wide range of professional assistance." *Id.* at 689, 104 S. Ct., at 2065; *see also Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305

(1986). Most of the arguments Petitioner raises in claim number two appear as allegations of trial error in other sections of his petition. Nonetheless, the Court will address those claims in this section as well.

First, Petitioner claims that his trial counsel provided ineffective assistance by failing adequately to make the need clear for the appointment of a soil expert, shoe print expert, DNA expert, blood analysis expert, eyewitness identification expert, homicide investigation protocol expert, mass media expert, mitigation specialist, forensic psychologist. That argument lacks merit. As discussed above, the appointment of those experts was not necessary for the presentation of Petitioner's case.

Next, Petitioner claims that his trial counsel provided ineffective assistance by failing adequately to present evidence that Petitioner's wife was unable voluntarily to consent to a search of their home, thereby enabling the trial court to overrule his motion to suppress evidence obtained during that search. That argument lacks merit. All of the record evidence indicates that Petitioner's wife was competent to consent to a search, and Petitioner suggests the existence of no evidence that would indicate otherwise.

Next, Petitioner claims that his trial counsel provided ineffective assistance by failing adequately to prepare his motion to suppress the statements he made to law enforcement officers during interviews that occurred on February 10 and 12, 1993. That argument lacks merit. As discussed above, it was proper for the trial court to admit those statements.

Next, Petitioner claims that his trial counsel were unable adequately to prepare and present his case because the trial court improperly denied his counsel's request for a continuance to review 411 pages of material provided by the state eight days before the scheduled trial date. That argument lacks merit. The record indicates that Petitioner had access to all of the materials he needed to prepare for trial – approximately 3,000 pages of discovery – several months in advance of the trial date. Eight days before trial, the state erroneously forwarded 411 pages of documentation to which Petitioner was not entitled. (Tr. at 1707.) Petitioner requested a continuance to review the 411 pages, and the trial court denied the motion.

Contrary to Petitioner's assertions, Defense counsel demonstrated a thorough preparation for trial both before and during the trial of his case. Defense counsel filed 57 pretrial motions. At trial, defense counsel presented 31 witnesses and 41 defense exhibits were admitted into evidence. Defense counsel conducted a thorough and well-prepared cross-examination of each of the 32 prosecution witnesses, most of whom had been interviewed by defense counsel before trial. Petitioner has not demonstrated that his counsel were unprepared for trial.

Next, Petitioner claims that his trial counsel provided ineffective assistance during voir dire. He alleges that his counsel improperly failed to object when the trial court dismissed, for cause, jurors who were unable to serve because of medical problems, work conflicts, or other similar reasons. That

argument lacks merit. The trial court dismissed only those jurors who were legitimately unable to serve, or who expressed personal bias or an inability to follow the trial court's instructions.

Petitioner complains that his trial counsel improperly failed to object to the dismissal of jurors who expressed scruples about the death penalty. As discussed above, that objection lacks merit.

Petitioner complains that the trial court denied his request for complete sequestered voir dire. That argument lacks merit. The trial court conducted sequestered voir dire of all sensitive issues, and no evidence has been presented that anything occurred during the group voir dire that could have poisoned the jury.

Petitioner complains that his lead trial counsel was absent from a pretrial motions hearing, during which time routine court business was conducted. That argument lacks merit. Petitioner personally consented to lead counsel's absence, and co-counsel represented Petitioner effectively.

Petitioner complains that his lead trial counsel was absent for about an hour and a half of voir dire, during which time the trial court conducted the sequestered voir dire of two jurors who served on the petit jury. That argument lacks merit. Petitioner personally consented to lead counsel's absence, and co-counsel conducted an effective voir dire of the two jurors in question.

Petitioner complains that his lead trial counsel was absent for about three hours of jury deliberations, during which time the trial court gave

the jury an *Allen* charge. That argument lacks merit. Petitioner personally consented to lead counsel's absence, co-counsel was present, and Petitioner has shown no way in which lead counsel's presence could have affected that portion of the trial in any way.

Petitioner claims that his trial counsel failed to examine potential jurors on general theories of defense and mitigation. That argument lacks merit. The voir dire in this case took three days, and much of the voir dire was sequestered, in accordance with Petitioner's pretrial motion therefor. During both sequestered and group voir dire, Petitioner's trial counsel examined potential jurors on theories of defense and mitigation.

Petitioner claims that his trial counsel improperly failed to object to a statement by the trial court that "placed the blame for the [jury] questionnaire and the personal questions contained there in on the defense." That argument lacks merit. The record indicates that the trial court included the following statement in his introduction to the voir dire:

> I want to apologize at the outset for some of the questions that are in the questionnaire, because I'm sure some of you – you felt that that was an infringement on your right to be questioned and to have to respond as to your views to some of these questions. I recognize that. However, Courts above me have held that a Defendant is entitled to have these questions answered in order to receive a fair trial. . . . I can assure you that the Court

> and counsel have no intention of embarrassing any of the jurors by the questions they might ask.

(Tr. at 713.) There was nothing at all wrong with the trial court's statement. Indeed, the statement expressed sensitivity to jurors' possible concerns about the content of the questionnaire and, more likely than not, helped to diffuse any offense or embarrassment that might have occurred.

Petitioner claims that his trial counsel questioned potential jurors ineptly and antagonistically about their feelings on race and racial discrimination. In support, he cites to two excerpts from the transcript that (1) involve sequestered voir dire of venirepersons who did not serve on the petit jury; (2) do not address race or race discrimination; and (3) are not antagonistic. Petitioner has not cited to a single instance of inept or antagonistic questioning of venirepersons about race or race discrimination. On this record, Petitioner's argument must be rejected.

Petitioner claims that his trial counsel improperly failed to rehabilitate potential jurors, including one African-American potential juror, who expressed scruples about the death penalty. That argument lacks merit. Each of the potential jurors who was dismissed for cause after stating that he or she would not be able to impose the death penalty was thoroughly questioned, and was dismissed only after it became clear that he or she would not be able to apply the law as instructed by the trial court.

Petitioner claims that his trial counsel improperly failed to question or to challenge two female jurors who were pregnant at the time of the trial. The record indicates that one female juror indicated during voir dire that she was pregnant. (Tr. at 1278-80.) Counsel did question the juror about whether her pregnancy would impair her impartiality, and she stated that it would not. Counsel was entitled to rely on that representation. Petitioner's argument lacks merit.

Petitioner claims that his trial counsel improperly failed to question or to challenge two female jurors who were victims of domestic violence. That argument lacks merit. Counsel did question both jurors about whether their experiences, as victims of domestic violence, would impair their impartiality, and both stated that they would not. Counsel was entitled to rely on that representation.

Petitioner complains that his trial counsel were antagonistic to prospective jurors, and argued with the judge and the prosecution in front of the jurors. The Court has reviewed each of the twelve separate sections of the voir dire transcript Petitioner cites in support of his contention. Only one of those sections, (tr. at 1004-06), involve the voir dire of a juror who actually sat. The other sections either involve the sequestered voir dire of venirepersons who were ultimately discharged, or occurred out of the hearing of the jury altogether. Petitioner's voir dire of the juror who actually sat included the following exchange:

> Mr. Winkfield: You did indicate on your questionnaire that you

recognized that discrimination does exist in our society?

Ms. Bird: Oh, sure.

Mr. Winkfield: Do you harbor any ill will against Mr. Mason or myself because we're black people?

Ms. Bird: No, sir.

* * *

Mr. Winkfield: What are your views on interracial marriage and relationships?

Ms. Bird: What are my views on it?

Mr. Winkfield: Yes, ma'am.

Ms. Bird: I have no comments on that.

Mr. Winkfield: Is there a reason why you have no comments?

Ms. Bird: I don't think of it one way or another.

Mr. Winkfield: Okay.

Ms. Bird: I don't –

Mr. Winkfield: Okay. Your reason for saying no comments is not because there was something negative that you wanted to hide?

Ms. Bird: No.

(Tr. at 1005-06.) There is nothing at all inappropriate about counsel's performance during this exchange. Counsel was charged with asking potential jurors about a sensitive issue – race discrimination. He could not avoid the subject without risking a meritorious claim of ineffective assistance; indeed, Petitioner claims in many other portions of his petition for habeas corpus that his counsel should have inquired about the issue in more

detail. When Juror Bird gave her "no comment" answer to counsel's initial question, that response begged for a follow-up. There was nothing discourteous or antagonistic about counsel's behavior. Petitioner's argument lacks merit.

Petitioner complains that his counsel failed to challenge jurors who indicated that they would automatically impose a sentence of death. That argument lacks factual support. Every potential juror was questioned in detail about his or her attitude towards the death penalty. Each of the twelve jurors who served stated that they would consider the case on its individual merits, and would not automatically impose a sentence of death.

Petitioner complains that his counsel improperly described the guilt phase of the trial as the phase in which it would be determined whether Petitioner was "guilty or innocent," rather than "guilty or not guilty," and failed to object to similar statements by the prosecution. The Court has reviewed each of the nine separate sections of the voir dire transcript Petitioner cites in support of his contention. Only two of those sections, (tr. at 786, 1001), involve the voir dire of a juror who actually sat. In the first instance, Petitioner's counsel described the first phase of the trial as the "guilt or innocence" phase. That is a correct label. In the second instance, the Prosecutor informed a juror that "[t]he first phase of the case would be to determine the Defendant's guilt or innocence. At the end of that phase, the jury would go back and deliberate and vote guilty or not guilty." Again, that is a correct statement. The Prosecutor made it clear that the

jury's determination was "guilty or not guilty." Nothing about either statement implied in any way that the jury must find the defendant "innocent" in order to acquit, particularly in light of the detailed instructions on burden of proof that the jury received at the end of the case. Petitioner's argument lacks merit.

Next, Petitioner complains that his trial counsel were unprepared to try the case, were unfamiliar with the facts of the case, and had no plan of defense or mitigation at the commencement of trial. As discussed above, that argument lacks merit. Petitioner's trial Counsel spent months preparing for his case. They presented a thorough and well-prepared defense throughout the entire trial. Petitioner argues that his trial counsel "failed to develop and present an effective theory of defense," but gives no suggestion as to what more his counsel could have done. The evidence against Petitioner was overwhelming. Petitioner's counsel zealously presented a defense of actual innocence, and proffered what evidence they could in support of that theory. Petitioner's counsel vigorously cross-examined each of the government's witnesses. If the jury did not believe that Petitioner's arguments at trial created a reasonable doubt as to his guilt, it was because there was no reasonable doubt to be found. The state established conclusively that Robin Dennis had been raped before her death. The state also established conclusively that Petitioner was the only individual who had had sexual contact with Dennis on the date of her death. Petitioner's trial counsel did the best they could do in the face of evidence that was simply impossible to rebut.

Next, Petitioner complains that his trial counsel improperly failed to obtain *Brady* material prior to the case. As discussed above, that argument lacks merit. The record shows that Petitioner actually proffered at trial every piece of *Brady* material of which he alleges he was unfairly deprived.

Next, Petitioner complains that his lead counsel consistently engaged in abusive, argumentative and inflammatory conduct in front of the jury, which led to the trial court imposing a number of sanctions on him. The Court has reviewed each of the many sections of the trial transcript Petitioner cites in support of his contention. None has supports his assertions. The bulk of the instances cited by Petitioner involve routine evidentiary objections and requests to see prosecution exhibits. Many other instances to which the Court was cited consist of nothing but routine cross-examination. Other portions of the trial transcript cited by Petitioner reflect that the exchanges occurred entirely out of the jury's presence. In the 176 pages of trial transcript that Petitioner cites, the Court has found only two instances of even marginally improper conduct. At 2209, Petitioner's lead counsel and the trial court engaged in the following exchange:

> Mr. Winkfield: Your Honor, I just ask, for the record, that Mr. Slagle quit the snide remarks. I think it has a detrimental effect for the jury.

The Court: Mr. Winkfield, you're just exacerbating the entire thing. What's your objection?

At 3500, Mr. Winkfield and the Prosecutor engaged in a brief heated exchange (ten lines of transcript) outside the presence of the jury. Those two, isolated incidents probably totaling less than thirty seconds of actual time can hardly be described as consistent "abusive, argumentative and inflammatory conduct."

Petitioner claims that the Court threatened his lead trial counsel with contempt at 3787-88. Petitioner misstates the record. At the portion of the record cited by Petitioner, the trial court admonishes *spectators in the gallery* to refrain from talking; no mention is made of counsel for either side.

Next, Petitioner claims that his trial counsel improperly introduced evidence that Petitioner was on parole, and that his parole was revoked in April, 1993 for drinking while on parole, possessing a weapon while under disability, and talking to a known felon. (Tr. at 2721, 3550.) That argument lacks merit. In the context of the case, Petitioner had two choices: (1) truthfully inform the jury that he was incarcerated for parole violations in April, 1993; or (2) risk having the jury jump to the conclusion that he was arrested for Robin Dennis' murder in April, 1993. Petitioner's counsel's strategic choice of the former did not fall below the range of competence demanded of attorneys in criminal cases.

Next, Petitioner claims that his trial counsel improperly failed to challenge the testimony of

Witness Thomas Forster. That argument lacks merit. Mr. Forster never positively identified Petitioner as the man who was walking through the field immediately after the murder. Defense counsel thoroughly cross-examined Mr. Forster, and established that he was unable positively to identify Petitioner. (Tr. at 1666.) No special instruction was required.

Next, Petitioner claims that his trial counsel improperly failed to object to the introduction of government exhibit 65, a Colt .22 frontier revolver that was found in a barn near the murder scene. Petitioner claims the gun's relevance to the case was not demonstrated. Petitioner's argument lacks merit. First, Petitioner's trial counsel did, in fact, object to the introduction of the revolver. (Tr. at 1909-11, 1918-19.) Second, contrary to Petitioner's contention, the state did establish the revolver's relevance. (Tr. at 1932-35.)

Next, Petitioner claims that his trial counsel improperly failed to object to the introduction of government exhibit 30, a piece of metal consistent with a Colt single action .22 revolver, because the government's expert did not testify "to a reasonable degree of scientific certainty." That argument lacks merit. An expert witness is not required to use magic language in order for his testimony to be admissible, as long as the basis for his opinion is solidly established. Counsel's failure to object was not improper.

Next, Petitioner claims that his trial counsel improperly failed to object to the introduction of government exhibit 33, a piece of wood with human

hair, because the government's expert could not testify with certainty that the hair belonged to the victim. That argument lacks merit. Petitioner's objection goes to the weight of the witness' testimony, not to its admissibility, and the witness was subject to cross-examination. Counsel's failure to object was not improper.

Next, Petitioner claims that his trial counsel improperly failed to call Chris Dennis' mother to testify. He does not suggest the existence of even a single piece of admissible exculpatory evidence Chris Dennis' mother could have provided. (Tr. at 4275-76.) On this record, the Court cannot find Counsel's failure to call Chris Dennis' mother to be improper.

Next, Petitioner claims that his trial counsel improperly failed to object to the state's late disclosure of exculpatory evidence provided by Arthur Lewis Burchett a/k/a Lewis Marone. The record indicates that at about 10:20 on the morning of June 15, 1994, while the defense was presenting its case in chief, Burchett provided certain information about the murder to Detective Potts. Detective Potts informed the prosecution of that at 12:15 on that same date, and the Prosecutor provided defense counsel with two copies of Burchett's statement at 12:30. (Tr. At 3742-46.) In short, the government provided the defense with all the information it had about Burchett's statement within fifteen minutes of receiving that information. On this record, the disclosure cannot reasonably be described as "late."

Next, Petitioner claims that his trial counsel improperly failed to object when the Prosecutor

questioned him about his refusal to provide the state with a set of fingerprints, in violation of a court order. The record indicates that Petitioner was fingerprinted on four separate occasions, but that the fingerprints were always smudged, probably because Petitioner was not holding his hands still. Thereafter, Petitioner refused to provide the state with another set of prints, despite the fact that a court had ordered him to do so. Petitioner's argument lacks merit. On these facts, it was not error for the Prosecutor to question Petitioner about his refusal to provide fingerprints, and to comment on his failure to do so. Furthermore, the record indicates that Petitioner's trial counsel did, in fact, object to the Prosecutor's questions.

Next, Petitioner claims that his trial counsel improperly failed to object to the testimony of prosecution investigator Vicki Robbins, who testified regarding prior inconsistent statements by defense witnesses Troy and Shannon Elliott. Petitioner claims that Robbins' testimony consisted of inadmissible hearsay. That argument lacks merit. The state did not offer the Elliotts' prior inconsistent statements for the truth of the matter asserted; the statements were offered solely to show inconsistency. Thus, those statements were not hearsay at all. Robbins' testimony was admissible. Counsel's failure to object was not improper.

Next, Petitioner claims that his trial counsel improperly failed to object to prosecutorial misconduct during closing argument. That argument lacks merit. As discussed above, no such prosecutorial misconduct occurred.

Next, Petitioner claims that his trial counsel improperly failed to object to improper jury instructions at the guilt phase. That argument lacks merit. The jury instructions were correct.

Next, Petitioner claims that his trial counsel improperly failed to insist on obtaining the results of the DNA test of Robin Dennis' fetus. He offers no suggestion as to how that evidence could have produced a different result at trial. Petitioner's argument lacks merit.

Petitioner also raises a number of objections to his trial counsel's conduct during the penalty phase of the case. First, Petitioner claims that his trial counsel improperly failed to investigate possible psychosocial mitigating factors that could have spared him the death penalty. As discussed above, that argument lacks merit. Petitioner has not suggested the existence of any mitigating factor that is not overwhelmingly negated by his history of violent criminal conduct, including a prior rape and firearms offenses, multiple parole violations, and multiple drug offenses stretching as far back as elementary school. *Cf. Scott*, 2000 WL 390525, at *24. Petitioner's counsel's strategy of not presenting mitigating testimony in order to keep Petitioner's extensive criminal history from the jury was objectively reasonable. Nor has Petitioner shown prejudice; on this record, Petitioner cannot show a reasonable likelihood that any juror who was apprised of Petitioner's complete psychosocial history – including his prior criminal record – would not have voted for the death penalty. *Id.*

Next, Petitioner claims that his trial counsel improperly failed to object to the introduction of all guilt-phase evidence during the penalty phase of the case. As discussed above, that argument lacks merit. The trial-phase evidence was admissible. Furthermore, the record indicates that trial counsel *did* make a contemporaneous objection.

Next, Petitioner claims that his trial counsel improperly failed to convince the court to provide the jury instructions on residual doubt as a mitigating factor. That argument lacks merit. As discussed above, no such instruction was required.

Next, Petitioner claims that his trial counsel provided ineffective assistance because one alternate juror was dismissed after the jury returned its verdict at the guilt phase of the case, but before the commencement of the penalty phase. The Court is at a loss as to how the dismissal of the alternate juror can have affected the outcome in this case, since neither alternate juror participated in any portion of the deliberations. Petitioner's argument lacks any merit.

Next, Petitioner claims that his trial counsel improperly failed to object to the Prosecutor's "mischaracterization" of mitigating factors during his opening statement at the penalty phase. The record indicates that the Prosecutor instructed the jury: "You are allowed to consider the history, character, and background of the Defendant, and you are allowed to consider any other factors relevant to whether the Defendant should be sentenced to death." (Tr. at 4234.) That is a correct statement of the law. Counsel's failure to object was not error.

Next, Petitioner claims that his trial counsel improperly failed to object to the Prosecutor's cross-examination of Petitioner's wife, Terri Mason, about her activities on the day of the crime during the penalty phase. That argument lacks merit. Since Petitioner relied on residual doubt as a mitigating factor during the penalty phase, it was proper for the Prosecutor to ask Terri Mason questions aimed at removing that residual doubt.

Next, Petitioner claims that his trial counsel improperly failed to introduce mitigating evidence that Petitioner had saved the life of another inmate, Robert Rodeffer, who had attempted suicide. That argument lacks merit. As discussed above, Petitioner's counsel's strategy of not presenting mitigating testimony in order to keep Petitioner's extensive criminal history from the jury was objectively reasonable, and no prejudice has been shown.

Next, Petitioner claims that his trial counsel improperly failed to object to an erroneous instruction on unsworn statements. That argument lacks merit. As discussed above, it is not improper for the trial court to instruct the jury that an unsworn statement by an accused was not made under oath and was not subject to cross-examination.

Next, Petitioner claims that his trial counsel improperly failed to object to the *Allen* charge the trial court gave when the jury announced that it was deadlocked. That argument lacks merit. As discussed above, the *Allen* charge was proper.

Petitioner also complains about his trial counsel's post-trial conduct of the case. Petitioner claims that his trial counsel provided ineffective assistance by failing to convince the trial court that juror misconduct so tainted the proceedings that the verdict was unreliable. That argument lacks merit. As discussed above, no such juror misconduct occurred.

Next, Petitioner claims that his trial counsel improperly failed to object to prosecutorial misconduct. That argument lacks merit. As discussed above, no such prosecutorial misconduct occurred.

Next, Petitioner claims that his trial counsel improperly failed to object to incorrect jury instructions. That argument lacks merit. No error in the jury instructions has been shown.

Petitioner also raises certain complaints about the conduct of his appellate counsel in this case. Petitioner claims that his appellate counsel failed adequately to litigate the state's failure to disclose *Brady* material; the state's failure to provide adequate appellate and proportionality review; the constitutionality of Ohio's death penalty scheme; the trial court's denial of a change of venue; Petitioner's race discrimination claims; the denial of his motion to suppress; the death-qualification of the jury; the admission of crime-scene photographs; the admission of the transcript of Petitioner's police interviews; the exclusion of bad-acts evidence pertaining to Chris Dennis; prosecutorial misconduct; the jury instructions; the sufficiency of the evidence; juror misconduct; and his ineffective assistance of trial

counsel claims. As discussed above, all of those claims lack merit.

Petitioner's seventeenth challenge to his conviction and sentence is meritless. No evidentiary hearing is warranted.

CONCLUSION

At this point, the Court has addressed all of Petitioner's claims of error separately. The vast majority of Petitioner's claims are entirely without merit. Petitioner has, however, identified some trial errors. The Court now reviews those errors to determine if they, collectively, deprived Petitioner of a fair trial. Petitioner has raised the following meritorious points of error:

- a procedurally defaulted claim that the trial judge improperly agreed with Juror Crane's assertion that the death penalty, as currently applied, is an ineffective deterrent, made outside the presence of all jurors except Juror Crane;

- a claim that the trial court referred to "aggravating circumstances" in the plural during the penalty phase of the trial;

- a claim that some of the jurors joked about dew rags, beer runs, and Petitioner's nonstandard speech;

- a claim that Juror Downs improperly disassembled her husband's gun;

- a procedurally defaulted claim that the Prosecutor improperly vouched for the investigative officers during closing argument; and

• a procedurally defaulted claim that Petitioner's lead counsel accused the prosecutor of making " snide remarks."

Viewed together, these errors do not come close to depriving Petitioner of his right to a fair trial. No month-long trial is perfect. The issue on habeas review is not whether Petitioner received a perfect trial, but whether the trial errors rise to the level of a constitutional violation by creating a "substantial and injurious effect or influence in determining the jury's verdict." *California v. Roy*, 5 19 U.S. 2, 4-5, 117 S. Ct. 337, 338 (1997) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946). The trial errors in this case do not begin to rise to that level.

Accordingly, the Court finds that Petitioner has not demonstrated that he was denied his right to a fair trial. Petitioner's motion for a writ of habeas corpus and corrected motion for a writ of habeas corpus are denied.

The State's motion to strike Petitioner's traverse is denied. Petitioner's motion for an evidentiary hearing is denied.

IT IS SO ORDERED.

s/David A. Katz
U.S. DISTRICT JUDGE

APPENDIX G

SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE

v.

MASON, APPELLANT.

No. 97-239

82 Ohio St. 3d 144; 1998 Ohio 370;
694 N.E.2d 932

February 17, 1998, Submitted

June 17, 1998, Decided

On February 13, 1993, sheriff's deputies found the battered body of nineteen-year-old Robin Dennis inside an abandoned building in a rural area of Marion County near Pole Lane Road. Robin, lying face down, was wearing only a bra. Her jeans and panties were positioned around her ankles and lower leg. Eight feet from Robin's body detectives found her jacket, with burrs and debris on it. Her T-shirt and car keys were under the coat.

The apparent murder weapon, a blood-stained board with protruding nails, was lying some twenty feet from her body. Hair adhering to another piece of wood found at the scene matched Robin's hair.

After an autopsy, pathologist Dr. Keith Norton concluded that Robin died as a result of blunt force trauma causing multiple skull fractures. Dr. Norton found eight distinct lacerations on Robin's head. Robin also suffered a black eye and bruises on her head, face, and body. She had been strangled, possibly causing unconsciousness, but she did not die

of strangulation. In Dr. Norton's view, the blood-stained board found at the scene could have caused her injuries, but some injuries may also have been caused by the butt of a revolver.

Dr. Norton found no trauma to the victim's genitalia, but he found sperm in her vagina. He testified that sperm can remain six to twelve hours after intercourse in the vagina of a woman doing normal activities.

According to DNA experts called by the state, material taken with vaginal swabs from the victim matched the DNA of appellant Maurice Mason. As to this material, a DNA match could be expected from only one in eight thousand three hundred people of the same race as Mason. DNA material from Robin's panties also matched Mason's DNA, and the odds against a similar DNA match among individuals of his race were four million to one. Roughly comparable odds existed as to other races. Experts did not find DNA from anyone other than the victim and Mason.

Dr. Richard Durbin, the coroner who examined the body at the scene, believed Robin had been killed at the scene and had been dead for several days. From her appearance and injuries, Dr. Durbin thought Robin had been raped or sexually molested.

Robin's body was found within eighteen minutes' walking distance of where her abandoned car had been found stuck in a farm field three days earlier. On the inside of the passenger door, a police technician found type B blood, Robin's blood type.

On the outside passenger car door and on the passenger's side of the dash, a forensic investigator found what appeared to be chevron style tennis shoe

impressions. The state established that Mason owned shoes bearing similar chevron designs and that Robin Dennis's shoes with a similar chevron design were found at the crime scene. The prosecutor later argued that the location of the marks and blood inside the car were consistent with a struggle having taken place in and around the car.

A set of keys, including car keys that fit a 1981 Chrysler belonging to Mason's wife, were on the car's front passenger seat.

Thomas Forster, a farmer, testified that he saw a per-son fitting Mason's description walking in his fields towards Pole Lane Road around 4:10 p.m. on February 8, the date of Robin's disappearance. That location was a seven-to-nine-minute walk from the building where Robin's body was later found, and approximately a seventy-minute walk from where Mason lived. The man Forster observed was black, weighed about two hundred pounds, and was wearing jeans, a jacket, and a bandanna on his head. Mason is black, weighed two hundred fifteen pounds, and was wearing a bandanna earlier that day.

Around 4:15 p.m., Deputy Sheriff Jack Lautenslager noticed a black man walking along Pole Lane Road. The man was wearing a dark jacket and a blue bandanna with white specks. Lautenslager later identified Mason as the man he saw on February 8 by choosing his photo from a group of five or six photos.

Around 4:30 p.m. that same afternoon, Francis Forster, Jr., farmer Forster's brother, noticed a light-colored compact car in a field near New Road. Two days later, on February 10, Forster saw sheriff's deputies inspecting the same car, still in the field.

On February 15, detectives found a small

blood-stained piece of metal at the crime scene. A firearms examiner concluded that this piece of metal was identical in size, shape, and design to a grip-frame from a Colt .22 caliber Frontier Scout Revolver and was consistent with having come from the handle of such a revolver. A similar weapon had been the subject of an agreement between Robin's husband and Mason under which the gun would be traded for Mason's television.

A technician found type B blood, Robin's blood type, on the side of a tennis shoe Mason was wearing on February 12. Approximately eleven percent of Caucasians and twenty percent of blacks have type B blood.

Trial testimony established Robin's activities prior to her death. On February 7, Robin and her husband, Chris Dennis, drove to the home of friends Mike and Carol Young in Marion and stayed overnight. Chris brought a Colt .22 caliber Frontier Scout revolver with him.

On February 8, Robin and Chris went to the Marion office of H & R Block. Later they stopped at the home of Rick McDuffie, whom Chris knew. Mason, who was acquainted with the victim's husband and was McDuffie's cousin, also was present at the McDuffie house. According to the testimony of several state witnesses, Robin, Chris and Mason later returned together to the Young house.

While there, Chris and Mason discussed trading Chris's Colt revolver for Mason's TV. State witnesses testified that Mason and Robin left the Youngs' house in Robin's car around 3:00 p.m. on

February 8 to pick up Mason's television set. Before Robin and Mason left, Chris passed out intoxicated in the living room of the Youngs' house and did not awake until later that evening after they were gone.

Robin never returned, and Chris Dennis's gun was never seen again. Despite Mason's admission that he discussed trading his television for the gun with Chris, he claimed that the trade never occurred and that he never had the gun.

Mason's testimony as to his activities on the date of Robin's disappearance conflicted with that of the state's witnesses. Mason testified that he first met Robin in September 1992, and that they had spent a night together and engaged in consensual sex. He claimed that they had had sex a few times since then. He testified that on the date Robin disappeared, he had consensual sex with her around 10:30 a.m. at Rick McDuffie's house, and that later Chris and Robin dropped him off at his home around 3:00 p.m., after which he went walking, and that he never saw Robin after that.

Mason said that between 3:00 and 5:00 p.m. on that day, he visited Gerald Gorham at a laundromat, and drank with him at a park. Gorham corroborated Mason's visit, but did not know on which day it occurred.

Sandy Childers testified that she saw Mason after 5:00 p.m., when he was out walking, then picked him up around 5:20 p.m. and drove him to his home. Mason later walked over to Sandy's, where he spent the evening, and others confirmed that Mason arrived at Sandy's between 6:00 p.m. and 7:00 p.m.

Mason admitted that he had initially told police that he was home after 2:30 p.m. on February 8, and that when his wife came home at 4:15 p.m., they went to the YMCA. He also initially denied to police that he had ever been alone with Robin.

At trial Mason admitted that the keys discovered in Robin's abandoned vehicle were his, but claimed that police took them from him when he was taken into custody on February 12, 1993. Police inventory records, however, indicated that Mason had no keys with him on February 12.

Moreover, February 10 photos of the car's interior indicate that Mason's keys were the keys found in Robin's car that day. Also, on February 11, police towed the car to a city garage and, on February 12, disassembled the car (door, seats and dash removed). Since the car was never reassembled, the photos could not have been taken after the February 12 disassembly.

Mason claimed that he did not, on February 8, wear the tennis shoes introduced as evidence by the state. He testified that his brothers and father had also worn his shoes. He theorized that the blood found on his shoe might have come from his father. He testified that he had previously worked at a slaughterhouse, and he speculated that the blood may have come from coworkers at a slaughterhouse who had cut themselves and might have bled on his shoes.

Mason denied that he had been in the vicinity of the crime scene on February 8, and denied killing Robin. On cross-examination, Mason asserted, "I

didn't kill her, and her husband [Chris Dennis] did. I know that. You know that, and everybody else knows that."

In 1984, Mason had been convicted of burglary and thus had a prior conviction for an offense of violence and could not legally possess firearms. In 1988, Mason was also convicted of drug trafficking.

Mason was indicted, tried by jury, and convicted of aggravated felony murder, rape, and having a weapon while under disability. He was further found guilty of the death-penalty specification of committing murder in the course of a rape, and further specifications involving fire-arms, prior felony, and prior offense of violence. Thereafter the jury returned a recommendation that he be sentenced to death, and that recommendation was accepted by the trial court.

The court of appeals affirmed Mason's convictions and death sentence, and the cause is now before this court upon an appeal as of right.

COUNSEL: Jim Slagle, Marion County Prosecuting Attorney, for appellee.

William F. Kluge and David C. Stebbins, for appellant.

JUDGES: MOYER, C.J. DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

[**942] [*148] MOYER, C.J. Mason has raised twenty-two propositions of law. We have reviewed each, and, for the reasons stated below, we find that none justifies [*149] [**943] reversal of Mason's

convictions. We have fulfilled our responsibilities to independently review the record, weigh the aggravating circumstances against the mitigating factors, and examine the proportionality of a sentence of death in this case. Upon full review of the record, we affirm Mason's convictions and death sentence.

I

Denial of Experts

Mason argues that the trial court violated his constitutional and statutory rights by failing to provide adequate funds for investigative and expert assistance, despite the fact that he was provided funds for obtaining the services of a private investigator, a forensic psychiatrist, and a forensic pathologist, and for blood and DNA testing. He contends that the trial court should have also provided funds to enable him to hire (a) a soils and trace evidence expert, (b) an expert on shoeprints, (c) an eyewitness identification expert, (d) a social worker or mitigation expert, (e) a homicide investigation expert, (f) a mass media expert, (g) a forensic psychologist, (h) a statistical DNA expert, and (i) a firearms expert.

As a matter of due process, indigent defendants are entitled to receive the "raw materials" and the "'basic tools of an adequate defense,'" which may include provision of expert psychiatric assistance. *Ake v. Oklahoma (1985), 470 U.S. 68, 77, 105 S. Ct. 1087, 1093, 84 L. Ed. 2d 53, 62* (quoting *Britt v. North Carolina [1971], 404 U.S. 226, 227, 92 S. Ct. 431, 433-434, 30 L. Ed. 2d 400,*

403). The *Ake* court held that provision of an expert to a defendant was required when necessary to prepare an effective defense based on his mental condition, when his sanity at the time is seriously in question.

While *Ake* involved the provision of expert psychiatric assistance only, the case now is generally recognized to support the proposition that due process may require that a criminal defendant be provided other types of expert assistance when necessary to present an adequate defense. Pursuant to *Ake*, it is appropriate to consider three factors in determining whether the provision of an expert witness is required: (1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided. *Ake at 78-79, 105 S. Ct. at 1093-1094, 84 L. Ed. 2d at 63.* Pursuant to the third of these factors, due process does not require the provision of expert assistance relevant to an issue that is not likely to be significant at trial. Nor does due process require that an indigent defendant be provided all the assistance that a wealthier counterpart might buy. Rather, he or she is entitled only to the basic and integral tools necessary to ensure a fair trial.

[*150] Due process, as guaranteed by the *Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution*, does not require the government to

provide expert assistance to an indigent defendant in the absence of a particularized showing of need. Nor does it require the government to provide expert assistance to an indigent criminal defendant upon mere demand of the defendant. We observed in *State v. Broom (1988), 40 Ohio St. 3d 277, 283, 533 N.E.2d 682, 691*, that, pursuant to *Ake* and its progeny, in order to establish a violation of due process as guaranteed by the *Fifth and Fourteenth Amendments to the United States Constitution*, "'a defendant must show more than a mere possibility of assistance from an expert. Rather, a defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.'" Quoting *Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. Mo. 1987).*

Further, as a matter of statutory law, *R.C. 2929.024* requires trial judges to grant funds in aggravated murder cases for investigative services and experts when "reasonably necessary for the proper representation" of indigent defendants. Such decisions are to be made "in the sound discretion of the court" based upon" (1) the value of the expert assistance to the defendant's proper representation * * * and (2) the availability [**944] of alternative devices that would fulfill the same functions." *State v. Jenkins (1984), 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264*, paragraph four of the syllabus. See, also, Sup.R. 20(IV)(D).

Accordingly, we hold that due process, as guaranteed by the *Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution*, requires that an

indigent criminal defendant be pro-vided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial.

In applying these principles to the case before us, we conclude that Mason has not demonstrated that the trial court abused its discretion in denying him some funds for experts while allowing other funds.

Soils Expert. Mason did not demonstrate a particularized need for a soils expert. At trial, Mason repeatedly made his primary point, namely, that the state produced no evidence of dirt or debris on his clothing showing that he had been walking through farm fields four days before. Mason did not need a soils expert to make that point.

Even had a soils expert testified that dirt on Mason's shoes was not consistent with dirt found at the crime scene, the probative value of that evidence would have been minimal at best, in that the shoes were not taken by the police for [*151] several days after Robin's disappearance. Hence, Mason did not show that the fairness of his trial was dependent upon being provided a soils expert. *State v. Broom (1988), 40 Ohio St. 3d 277, 283, 533 N.E.2d 682, 691.*

Shoeprint Expert. Mason claims that the trial court erred in not granting his untimely request, made on the sixth day of trial, for a shoeprint expert. A police

technician found impressions of a chevron design, possibly a shoeprint, on the Buick's dashboard and passenger door, which suggested a struggle. Both the victim and Mason wore tennis shoes with chevron soles, although the impressions were too faint to trace to any particular shoe.

Both the state and the defense acknowledged, however, that Mason and Robin had both been in the car on February 8. The state argued that the shoeprints were relevant because they tended to support the state's contention that a struggle had taken place in the car. Mason did not make a particularized showing that a shoeprint expert might have rebutted that inference or that a privately retained shoe expert would have been able to identify the shoe-prints more specifically than could the state's experts.

In the court of appeals, Mason complained only of the trial court's failure to provide him with a soils expert and a shoeprint expert. This court "will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court." *State v. Williams (1977), 51 Ohio St. 2d 112, 5 Ohio Op. 3d 98, 364 N.E.2d 1364*, paragraph two of the syllabus. However, upon review in this capital case, we conclude that Mason's remaining claims as to funds for experts not pursued before the court of appeals also lack merit whether viewed on a plain-error basis or as a claimed abuse of discretion.

Eyewitness Identification Expert. A trial court can legitimately refuse funds for an expert absent "a showing of demonstrable prejudice." *State*

v. Broom, 40 Ohio St. 3d at 284, 533 N.E.2d at 691. Mason made no such showing. The state did not rely solely on eyewitness identifications to link Mason to the murder of Robin Dennis. Rather the state presented other substantial evidence connecting Mason to those crimes.

Defense counsel was able to fully and adequately cross-examine each of the eyewitnesses (Deputy Lautenslager, Francis Forster, and Thomas Forster), and thereby cast doubt on the accuracy of their recollections. Moreover, Mason did procure an expert on eyewitness identification without state funds. Because the jury heard his testimony and nevertheless convicted Mason, the trial [**945] court's refusal to provide funds for such an ex-pert was harmless.

The trial court acted within its discretion in denying funds for an expert on eyewitness identification to assist the defense in challenging the validity of the [*152] eyewitnesses' identification of Mason as the black male in the area of Robin's car on February 8.

Homicide Investigation Expert. The trial court did not abuse its discretion in refusing to grant additional funds for the defense to obtain a second investigator for the purpose of critiquing the police investigation. Such funds were not necessary to ensure the fairness of Mason's trial, nor did Mason's request point to more than a mere possibility that such an expert might have been relevant to the defense. The trial court did allow funds for an expert investigator, and his investigation helped to produce over thirty defense witnesses in the trial phase.

Mass Media Expert. The services of a mass media expert were not reasonably necessary for proper representation or to guarantee the fairness of Mason's trial. See *State v. Jenkins, 15 Ohio St. 3d at 193, 15 Ohio B. Rep. at 336, 473 N.E.2d at 292* (sociologist to assist voir dire unnecessary); *State v. Landrum (1990), 53 Ohio St. 3d 107, 117, 559 N.E.2d 710, 723* (psychologist for jury selection unnecessary).

Firearms Expert. Mason did not make a particularized showing of need for a firearms expert. A state expert witness did testify that a piece of metal found at the crime scene matched the characteristics of the grip-frame from a Colt revolver. Chris Dennis had such a gun, and the evidence indicates he had agreed to trade it to Mason for a television.

But testimony from a traditional firearms expert would not have helped Mason. The compelling evidence on this point was simply the observable similarity between the crime-scene piece of metal and a grip frame from a Colt revolver, as well as a comparison photograph of the two items. Moreover, that evidence could equally incriminate Chris Dennis, and thus support the defense claim that Chris murdered his wife. Again, Mason failed to demonstrate an abuse of discretion.

DNA Statistical Expert. Mason failed to demonstrate a need for a DNA statistical expert. Ultimately, Mason did not dispute the DNA test results. Provision of a DNA statistical expert would have been superfluous, and the absence of one did not render the trial unfair.

Forensic Psychologist. Mason also failed to demonstrate an abuse of discretion in the denial of funds for a defense forensic psychologist. Cf. *State v. Powell (1990), 49 Ohio St. 3d 255, 256-258, 552 N.E.2d 191, 194-195; State v. Esparza (1988), 39 Ohio St. 3d 8, 529 N.E.2d 192.* Mason's mental status was not a central feature of the trial, as in *Ake v. Oklahoma.* Mason did secure the ser-vices of a psychiatrist, at state expense, although he decided, for tactical reasons, not to present that testimony.

Social Worker/Mitigation Expert. Nor was Mason en-titled to the assistance of a social worker or mitigation expert in the penalty phase as he claims. See *State v. Gumm (1995), 73 Ohio St. 3d 413, 427-428, 653 N.E.2d 253, 267.* The defense [*153] team of two lawyers and an investigator looked fully into Mason's background. Moreover, the state had collected and released to the defense in January 1994 voluminous records concerning Mason, including records about his last nine years in and out of prison as well as school records and juvenile incarcerations. In fact, Mason deliberately chose not to present background mitigation evidence to avoid unfavorable rebuttal evidence from the state. Thus, Mason has again failed to demonstrate an abuse of discretion or outcome-determinative plain error.

In sum, we reject Mason's contention that the trial court's refusal to provide him with all the experts he re-quested denied him his constitutional or statutory rights.

II

Suppression of Pretrial Statements

Mason claims that the trial court erred in refusing to suppress statements he made during police interviews on February 10 and 12 because police did not advise him of his [**946] *Miranda* rights, and because his statements were involuntary. Although Mason made no directly in-criminating statements, his pretrial account of his February 8 activities was used to demonstrate a conflict with his trial testimony as to events relevant to Robin's death.

On February 10, Detective Dennis Potts stopped by Mason's house, drove him to the police station, asked him questions for eighteen minutes, then drove him home after driving by the Youngs' residence. On February 12, Potts again stopped at Mason's house and asked whether he would go to the police station for further interviews. Mason again voluntarily agreed. The ensuing conversations, all recorded, began at 11:29 a.m. and lasted until 3:24 p.m. Mason was cooperative and talked freely throughout.

Around 4:00 p.m., police advised Mason of his *Miranda* rights, and his parole officer (who had secretly observed the interview) arrested him for violating the conditions of his parole by drinking and associating with felons. After Mason asked for an attorney, police stopped further questioning.

Until he was told that he was under arrest, detectives never told Mason that he could not leave, and he was never handcuffed. Mason acknowledged that he was left alone two or three times, the door was not locked, and that the first time he understood

that he would be arrested and could not leave was around 4:00 p.m.

Only a custodial interrogation triggers the need for a *Miranda* rights warning. *Berkemer v. McCarty (1984), 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317.* The evidence supports the trial court's finding that Mason was not in custody when questioned.

[*154] The fact that a suspect is being interviewed at a police station does not, *per se*, require a *Miranda* rights warning. Rather, the determination as to whether a custodial interrogation has occurred requires an inquiry into "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty, 468 U.S. at 442, 104 S. Ct. at 3151, 82 L. Ed. 2d at 336.* "The ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler (1983), 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, 1279,* quoting *Oregon v. Mathiason (1977), 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719.*

Since Mason was not in custody, police did not violate his *Miranda* rights. See *Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714; California v. Beheler, 463 U.S. at 1123, 103 S. Ct. at 3519, 77 L. Ed. 2d at 1278; State v. Biros (1997), 78 Ohio St. 3d 426, 440, 678 N.E.2d 891, 904.*

Moreover, evidence supports the trial court's finding that Mason's statements were voluntary. A court, in determining whether a pretrial statement is

involuntary, "should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of inter-rogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards (1976), 49 Ohio St. 2d 31, 3 Ohio Op. 3d 18, 358 N.E.2d 1051*, paragraph two of the syllabus.

In this case, Mason was a thirty-year-old high school graduate who had taken some college courses. He had two prior felony convictions and was experienced with criminal investigations. He was not threatened, mistreated, coerced, or wrongfully induced to make statements. Moreover, questioning on February 10 lasted only eighteen minutes, and the February 12 questioning, although spread over four hours, included substantial periods of inactivity. Under the totality of circumstances, his pretrial statements in which he continued to maintain his innocence were voluntary. *Compare State v. Loza (1994), 71 Ohio St. 3d 61, 66, 641 N.E.2d 1082, 1094.*

The trial court did not err in finding that, during the initial two interviews on February 10 and February 12, 1993, the defendant was not in custody and therefore the officers were not required to provide him with *Miranda* warnings. Nor did the trial court err in finding the statements to have been voluntarily made.

[**947] III

Denial of Continuance

Mason argues that the trial court erred in failing to grant his counsel's requests for reasonable

continuances in order to investigate and prepare for trial. His claim lacks merit.

[*155] "The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge." *State v. Unger (1981), 67 Ohio St. 2d 65, 21 Ohio Op. 3d 41, 423 N.E.2d 1078,* syllabus. In both *State v. Spirko (1991), 59 Ohio St. 3d 1, 17, 570 N.E.2d 229, 249,* and *State v. Landrum, 53 Ohio St. 3d at 115, 559 N.E.2d at 721,* this court held that the trial court did not abuse its discretion in denying a continuance despite counsel's claims that they needed more time to prepare. In *State v. Johnson (1986), 24 Ohio St. 3d 87, 94-95, 24 Ohio B. Rep. 282, 288-289, 494 N.E.2d 1061, 1067-1068,* the trial court was found to have abused its discretion in denying a continuance, but *Johnson* involved newly discovered evidence, a situation not present here.

On January 19, 1994, the prosecutor released approximately three thousand pages of Mason's institutional records to defense counsel, which the prosecutor claims were not subject to discovery. The trial judge stated that after release of the records, both the prosecutor and the defendant agreed to May 31, 1994 as a firm trial date.

On May 23, 1994, Mason moved for a continuance on the basis that the state had disclosed two days earlier an additional four hundred eleven pages of relevant police investigative reports and witness statements. Mason's counsel argued that more time was needed to study, analyze, and follow up on this mass of information. The court denied the motion on May 27.

At the start of voir dire, on May 31, Mason's lead counsel renewed his arguments for a continuance, declaring that he was unprepared to go forward and would not do so. After hearing his explanations, the trial court expressed skepticism as to the legitimacy of the need for continuance. When the court threatened to remove counsel without pay, counsel agreed to proceed to trial.

The trial court did not abuse its discretion in determining that Mason's counsel had been allowed adequate time to review the witness's statements, police investigative files, and other materials that were furnished to him. His two appointed counsel first appeared at pre-trial hearings in October 1993, eight months before trial began on May 31, 1994.

In addition to two counsel, the trial court also granted the defense funds for a trained investigator, a psychiatrist, pathologist, and for blood and DNA testing. Counsel received additional assistance from the State Public Defender's Office. Prior to trial, Mason filed more than fifty pretrial motions and conducted several pretrial hearings. At trial, he called thirty-one witnesses. Contrary to Mason's claim, counsel had more than enough time to prepare, and the record demonstrates extensive preparation.

In sum, Mason has not demonstrated that the court abused its discretion in denying defense motions for continuance made only eight days before the [*156] scheduled trial date and on the morning of trial. Nor has Mason demonstrated that his counsel needed more time to effectively represent him.

IV

Jury Selection Issues

Mason contends that the trial court and defense counsel erred in voir dire by referring to the jury's sentences verdict as a recommendation. Although the term "recommendation" was used briefly in voir dire and in final instructions, the judge and counsel generally avoided the term. Further, we have previously held that use of the term "recommendation" does not constitute error. See, *e.g., State v. Davie (1997), 80 Ohio St. 3d 311, 326, 686 N.E.2d 245, 260-261; State v. Jenkins, 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264,* paragraph six of the syllabus. In this case, error did occur in using the term "recommendation" in reference to a possible verdict of a life sentence, as a jury recommendation of a life sentence is binding on the trial court. But the error is harmless.

[**948] Mason further argues that during the jury selection process, the trial judge unduly restricted voir dire, the prosecutor engaged in prosecutorial misconduct, and Mason's counsel failed to provide effective assistance. These claims lack merit.

Mason first argues that the trial court unfairly restricted voir dire as to prospective jurors' views about race. As Mason points out, *Turner v. Murray (1986), 476 U.S. 28, 36-37, 106 S. Ct. 1683, 1688, 90 L. Ed. 2d 27, 37,* held that a "capital defendant accused of an interracial crime is entitled to have prospective jurors * * * questioned on the issue of racial bias."

Nonetheless, the *Turner* court also recognized that "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. See *Ham v. South Carolina, 409 U.S. 524, 527, 93 S. Ct. 848, 850-851, 35 L. Ed. 2d 46, 50 (1973).*" *Turner, 476 U.S. at 37, 106 S. Ct. at 1689, 90 L. Ed. 2d at 37.* In Ohio, too, the scope of voir dire is within a trial court's discretion and varies with the circumstances. See *State v. Bedford (1988), 39 Ohio St. 3d 122, 129, 529 N.E.2d 913, 920; Crim.R. 24(A); R.C. 2945.27.*

In this case, the trial court allowed Mason an opportunity to discern racial bias as required by *Turner v. Murray, supra.* Before trial, each juror was asked to complete a forty-one-question form, specifically designed for this case, which asked questions as to their background, experiences, and attitudes.

Moreover, during individual voir dire, the trial court allowed prospective jurors to be asked about racial prejudice or bias. Admittedly, the trial court wanted to defer extensive questioning about racial bias to general voir dire. But the trial [*157] court has discretion over whether to cover this subject in individual or general voir dire. *Turner, 476 U.S. at 37, 106 S. Ct. at 1689, 90 L. Ed. 2d at 37; State v. Brown (1988), 38 Ohio St. 3d 305, 528 N.E.2d 523,* paragraph two of the syllabus.

In fact, Mason's counsel asked jurors about their racial attitudes both during individual and general voir dire, which extended into three days. Thus, Mason was not denied an opportunity to

question jurors on racial attitudes. See, also, *State v. Durr (1991), 58 Ohio St. 3d 86, 89, 568 N.E.2d 674, 678-679.*

Mason complains because, during individual voir dire of juror Crane, the trial judge said, "I agree with you there" after Crane remarked that "people are sentenced to death, and then they don't do anything about it anyhow, so it's not really a deterrent." Previously, the court, in referring to the crimes of child murder and rape, stated, "There are certain cases that – where the death penalty is proper and, of course, that would be one of them. And you're saying that you would apply that as one of them?" Mason con-tends that these remarks constituted inappropriate comment by the court as to its view of the death penalty.

Although improper, the court's isolated remarks to single jurors was largely innocuous, and evoked no defense objection. The trial court instructed the jury to disregard any "indication of my view on the facts" and to disregard, in determining the penalty, any "indication of its view of the case." Unless it is proven otherwise, the jury is presumed to follow such instructions. See *State v. Henderson (1988), 39 Ohio St. 3d 24, 33, 528 N.E.2d 1237, 1246.*

Mason also claims that the prosecutor's reference to the "guilt phase" of the trial in individual voir dire of six prospective jurors created a "presumption of guilt." However, three of them did not sit as jurors. Moreover, the prosecutor explained to all that the first phase dealt with determining guilt or innocence. The first phase of a bifurcated capital case may be referred to as the "guilt phase"

as a convenient abbreviation, rather than using awkward terms such as the "guilt or innocence phase" or "determination of guilt or innocence" phase.

Mason also claims his counsel was ineffective during jury selection. Yet reversal of a conviction or sentence based on ineffective assistance requires finding both (a) deficient performance, "errors so serious that counsel was not functioning as the 'counsel' [**949] guaranteed the defendant by the Sixth Amendment," and (b) prejudice, "errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693.* Accord *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373.*

Mason's complaints mostly amount to hindsight views about how current counsel might have voir dired the jury differently. However, we will not second-guess trial strategy decisions, and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional [*158] assistance." *Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.* See, also, *State v. Davis (1991), 62 Ohio St. 3d 326, 349-350, 581 N.E.2d 1362, 1381.*

As to all of Mason's claims of ineffective assistance in regard to counsel's performance at voir dire, Mason fails to establish prejudice, namely, "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley, 42*

Ohio St. 3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

Mason argues that the prosecution improperly used peremptory challenges to exclude prospective jurors based on their opposition to the death penalty. But Mason waived the claim when he failed to ask for the state's explanation. See *State v. Lundgren (1995), 73 Ohio St. 3d 474, 485, 653 N.E.2d 304, 317.* Moreover, apart from excluding jurors based on race or sex, "prosecutors can exercise a peremptory challenge for any reason, without inquiry, and without a court's control." *State v. Seiber (1990), 56 Ohio St. 3d 4, 13, 564 N.E.2d 408, 419; J.E.B v. Alabama ex rel. T.B. (1994), 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89. Batson v. Kentucky (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69*, does not extend to peremptory strikes against jurors opposed to the death penalty. *State v. Evans (1992), 63 Ohio St. 3d 231, 249, 586 N.E.2d 1042, 1057; State v. Esparza, 39 Ohio St. 3d at 13-14, 529 N.E.2d at 198.*

Thus, Mason's contention that his conviction should be reversed based on error in voir dire is rejected.

V

Guilt-Phase Issues

Gruesome Photos. Mason argues that the state's use of "cumulative, gruesome, [and] inflammatory color photo-graphs" denied him a fair trial and due process. Under *Evid.R. 403*, the admission of photographs is left to a trial court's sound discretion. *State v. Maurer (1984), 15 Ohio St.*

3d 239, 264, 15 Ohio B. Rep. 379, 401, 473 N.E.2d 768, 791. Relevant, nonrepetitive photographs are admissible in capital cases, even if gruesome, as long as the probative value of each photograph outweighs the danger of material prejudice. *Id.* at paragraph seven of the syllabus.

Mason has failed to show that the trial court abused its discretion or that prejudicial impact of any of six crime-scene photos of the victim or three autopsy photos outweighed its individual probative value. These photographs were limited in number, and small (3-1/4 by x 5 inches). They are not particularly gruesome or inflammatory. Two of the crime-scene photos were cumulative, but we find the error in admitting both to be harmless.

[*159] The probative value of each photo is apparent. The prosecution's theory of the circumstances surrounding Robin's death was that a struggle of some type had taken place in the victim's car, after which the victim escaped and was chased into the abandoned building, where she was ultimately raped and murdered. The crime-scene photos of Robin's battered, bruised, and disrobed body, with her jeans and panties pulled below her knees, tend both to prove that her death was committed in con-junction with a sexual offense and to rebut any inference that Robin engaged in consensual sexual activity. Other photos portray Robin's injuries and are relevant to proof of intent to kill. Finally, the photos are admissible, since they illustrate the testimony of the coroner and police. *Maurer, 15 Ohio St. 3d 239, 15 Ohio B. Rep.* [**950]

379, 473 N.E.2d 768, paragraph seven of the syllabus.

The trial court did not commit prejudicial error in admitting the photographs as evidence.

Improper Transcripts. Mason argues that the state's use of "transcripts with clear racially derogatory overtones" of his February 1993 police interviews in addition to the tapes denied him a fair trial. Mason contends that by accurately portraying Mason's use of ethnic language, the transcripts created "racially derogatory overtones" and were "inherently prejudicial."

Yet Mason failed to object to use of the transcripts on this basis, although he had the transcripts and knew of their intended use. Had the issue been timely raised, revisions to the transcript might have been made. Mason waived this issue. *Evid.R. 103(A)(1)*.

Nor does plain error exist. Detective Potts testified that the transcripts were accurate, and counsel did not suggest otherwise. The jury knew about Mason's occasional use of ethnic English, since they had heard the tapes. "Where there are no 'material differences' between a tape admitted into evidence and a transcript given to the jury as a listening aid, there is no prejudicial error." *State v. Waddy (1992), 63 Ohio St. 3d 424, 445, 588 N.E.2d 819, 835*.

Further, the trial court did not abuse its discretion by allowing the transcripts in the jury room. The transcripts are useful and easier to understand than the tapes. See *United States v.*

Rengifo, 789 F.2d 975 (1st Cir. Mass. 1986). The court carefully instructed the jurors, "The transcripts are merely an aid to facilitate listening," and if they found any difference between the tape and transcript, "You should disregard the transcript and use your own judgment as to what was said * * * ." Under the circumstances, no prejudicial error occurred. See *United States v. Costa, 691 F.2d 1358, 1362 (C.A.11, 1982); United States v. Carson, 464 F.2d 424, 436-437 (C.A.2, 1972).*

Exclusion of Evidence of Other Acts of Victim's Husband. Mason contends that he was prevented from fully defending himself because the trial court refused to allow evidence of prior specific violent acts of Chris Dennis, Robin's [*160] husband. Mason contends that this exclusion hindered him in supporting his claim that Robin's murder had been committed by her husband. Mason argues that the trial court wrongfully excluded evidence that Chris Dennis (a) beat up a Chris Lyons and left him unconscious in a remote area in 1989, (b) attacked Ben Audin with a machete, and (c) struck his prior wife in the face.

Yet evidence that Chris Dennis had allegedly committed specific acts of violence was not admissible. Subject to certain exceptions, *Evid.R. 404(A)* provides, "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion * * * ."

None of the exceptions listed in *Evid.R. 404(A)* is applicable.

Mason argues that the exceptions to *Evid.R. 404(A)* should be expanded because Chris Dennis was not on trial. According to Mason, *Evid.R. 404* should not apply to witnesses or alternate suspects. But *Evid.R. 404*, by its terms, applies to all character evidence, not simply to persons accused of crimes.

Mason was allowed to present some evidence that tended to show the criminal propensity of Chris Dennis. One witness testified that Chris had knocked Robin's head against the dashboard of her car at a New Year's Eve party, and a second testified that she had seen Chris bloody Robin's face before she got into the car at this party. The court allowed this defense evidence to explain blood later found in the car. The first also commented on Chris's tendency for violence. The defense also questioned Chris about his heavy drinking and his fights with Robin.

The court did not abuse its discretion in refusing to allow evidence as to other specific acts of Chris Dennis, nor were Mason's constitutional rights violated thereby. See, generally, Annotation, *Admissibility of Evidence of Commission of Similar Crime by One Other* [**951] *Than Accused (1994)*, 22 A.L.R. 5th 1; *Winfield v. United States (D.C.App.1996), 676 A.2d 1; United States v. McCourt, 925 F.2d 1229, 1236, fn.* 12 (C.A.9, 1991).

Guilt phase instructions. Mason argues that the trial court erred by "instructing the jury that it must first determine that Mason was not guilty * * * of aggravated murder" before considering whether he was guilty of murder. Yet Mason failed to object at trial and thus waived all but plain error. *Crim.R.*

30(A); State v. Underwood (1983), 3 Ohio St. 3d 12, 3 Ohio B. Rep. 360, 444 N.E.2d 1332, syllabus.

The trial court instructed the jury: "If you find the Defendant not guilty of Aggravated Murder, you will then continue with your deliberations and determine whether or not the State of Ohio proved beyond a reasonable doubt all the essential elements of the lesser crime of murder."

[*161] We have held that instructions similar to those given here are not "acquittal first" instructions and did not constitute plain error. *State v. Allen (1995), 73 Ohio St. 3d 626, 638, 653 N.E.2d 675, 687;* cf. *State v. Thomas (1988), 40 Ohio St. 3d 213, 533 N.E.2d 286*, paragraph three of the syllabus. Moreover, since the jury found Mason guilty of raping Robin Dennis, it could not reasonably have found him not guilty of felony murder but guilty only of murder. The jury would have convicted Mason of aggravated murder rather than the lesser included offense of murder even if given the lesser included offense option. Cf. *Allen, 73 Ohio St. 3d at 637-638, 653 N.E.2d at 686-687.* Hence, assuming *arguendo* that error was committed, that error was necessarily harmless.

Thus, Mason's contention that his conviction should be reversed based on guilt-phase evidentiary rulings and instructions is rejected.

VI

Prosecutorial Misconduct

Mason claims pervasive prosecutorial misconduct during both the guilt and penalty phases of the trial, focusing on the state's cross-examination

of him and final guilt-phase and penalty-phase arguments.

Determination of whether improper remarks constitute prejudicial prosecutorial misconduct requires analysis as to (1) whether the remarks were improper and, (2) if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Smith (1984), 14 Ohio St. 3d 13, 14, 14 Ohio B. Rep. 317, 318, 470 N.E.2d 883, 885.*

During cross-examination of Mason, the state highlighted differences between his pretrial statements and his testimony. For example, in his pretrial statements, Mason claimed that he scarcely knew Robin and had never been alone with her. At trial, Mason asserted that she voluntarily had sex with him the morning of her death, thereby directly contradicting his pretrial statements. On cross-examination, over objection, the prosecutor asked Mason whether, consistent with his pre-trial claims, he had his "attorneys do independent DNA testing to see if our [the state's] DNA results were right?"

Under the circumstances, the state could remark on the differences between Mason's pretrial statement and his trial testimony and on the defense's decision to "switch strategies," and contrast his earlier denials and challenge to DNA testing with Mason's trial testimony that he had sex with Robin that day. By commenting on Mason's earlier lies to police, the prosecutor was not penalizing Mason for exercising his rights. See *State v. Landrum, 53 Ohio St. 3d at 110, 559 N.E.2d at 716-717.*

[*162] Admittedly, the state's remark in the final guilt-phase argument that Mason's counsel "tried to cloud the issues, tried to confuse" may have denigrated defense counsel. See *State v. Keenan (1993), 66 Ohio St. 3d 402, 406, 613 N.E.2d 203, 207.* Yet counsel failed to object to any of the prosecutor's final guilt-phase argument. Thus, he waived all but plain error. *State v. Wade (1978), 53 Ohio St. 2d 182, 7 Ohio Op. 3d 362, 373 N.E.2d 1244*, paragraph one of the syllabus; *Crim.R. 52(B).* No plain error exists. Here, as in *Landrum*, when "viewed in its total context, the prosecutor's final argument was reasoned, logical, and not emotional." *State* [**952] *v. Landrum, 53 Ohio St. 3d at 111, 559 N.E.2d at 717.*

Additionally, the state could point out the weakness in defense claims that Mason and Robin were romantically involved. The state could also remark on the inconsistency between Mason's attack on eyewitness testimony and his own reliance upon doubtful eyewitness testimony. "Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can reasonably be drawn from the evidence." *State v. Smith (1997), 80 Ohio St. 3d 89, 111, 684 N.E.2d 668, 689.*

The state did characterize Mason's testimony that police planted his keys in the victim's car as preposterous, but scene photos and the ensuing disassembly of the car proved that police never planted this evidence. "A prosecutor may state his opinion if it is based on the evidence presented at trial." *State v. Watson (1991), 61 Ohio St. 3d 1, 10, 572 N.E.2d 97, 106.*

The prosecutor did assert that the police "did an out-standing job" in their investigation, and thereby improperly vouched for the police. However, we do not find that prejudicial error resulted from the prosecutor's remarks, particularly in light of defense counsel's repeated criticism of the police investigation. Where a prosecutorial statement not supported by admitted evidence is "short, oblique, and justified as a reply to defense arguments and elicits no contemporaneous objection, there is no prejudicial error." *State v. Lott (1990), 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 300.*

In view of the weight of evidence of Mason's guilt, none of the remarks Mason now complains about constituted plain error. Nor as to issues preserved, such as the cross-examination about DNA, were his rights materially prejudiced.

Mason argues misconduct during the prosecution's closing penalty phase argument, but again his failure to object to remarks now complained about waives all but plain error. *State v. Wade, 53 Ohio St. 2d 182, 7 Ohio Op. 3d 362, 373 N.E.2d 1244*, paragraph one of the syllabus; *Crim.R. 52(B).*

No plain error or impropriety exists. The prosecutor's sentencing argument was restrained, noninflammatory, and based upon evidence before the court. Contrary to Mason's claims, the prosecutor correctly identified the aggravating circumstance and never attempted to make the murder an aggravating circumstance. [*163] "Moreover, the prosecutor could legitimately refer to the nature and circumstances of the offense, both to

refute any suggestion that they were mitigating and to explain why the specified aggravating circumstance * * * outweighed mitigating factors." *State v. Combs (1991), 62 Ohio St. 3d 278, 283, 581 N.E.2d 1071, 1077.*

The prosecutor could properly minimize the importance of Mason's good conduct in jail, his artistic ability, and family opinions that Mason should avoid the death penalty, and comment upon the paucity of relevant mitigating evidence. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson (1996), 74 Ohio St. 3d 381, 399, 659 N.E.2d 292, 309.*

Since Mason relied upon residual doubt, the prosecutor could comment that defense explanations seemed "far fetched." A prosecutor can respond to issues raised by an accused. *State v. Lundgren, 73 Ohio St. 3d at 491, 653 N.E.2d at 322.* The prosecutor did not exceed limits by noting that Mason made an unsworn statement on which he could not be cross-examined. *State v. Gumm (1995), 73 Ohio St. 3d 413, 653 N.E.2d 253,* syllabus ("counsel for the state may comment upon the defendant's unsworn statement, if any").

VII

Sufficiency of Evidence

Mason attacks the sufficiency of evidence to support his conviction for rape, aggravated murder during a rape, and the death-penalty specification that the murder occurred in the course of rape.

In a review for sufficiency following a conviction, the evidence must be considered [**953] in a light most favorable to the prosecution. *State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492*, paragraph two of the syllabus. "The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass, 10 Ohio St. 2d 230, 39 Ohio Op. 2d 366, 227 N.E.2d 212*, paragraph one of the syllabus.

The evidence was such that the jury could reasonably find Mason guilty of rape, aggravated felony-murder based upon rape, and the death-penalty specification alleging rape. First, sexual penetration was clearly evidenced by the presence of Mason's semen in Robin's body. Thus, cases finding insufficient evidence of rape or attempted rape due to the lack of evidence of actual or attempted sexual penetration are inapposite. See, *e.g., State v. Davis (1996), 76 Ohio St. 3d 107, 114, 666 N.E.2d 1099, 1107.*

Second, the element of force was supported by evidence of a struggle in Robin's car, and the fact that her jeans and panties were found pulled down [*164] below her knees. In addition, the evidence indicated use of force in that Robin had been both strangled and beaten. In other cases, similar evidence was sufficient to prove the element of force. See *State v. McGuire (1997), 80 Ohio St. 3d 390, 396, 686 N.E.2d 1112, 1118; State v. Williams (1996), 74 Ohio St. 3d 569, 576, 660 N.E.2d 724, 732; State v. Scudder (1994), 71 Ohio St. 3d 263, 274, 643 N.E.2d 524, 533.*

The jury had the right to believe the testimony of the state's witnesses and disbelieve Mason as to his activities on the date of Robin's disappearance. The record includes evidence that Robin and Mason left a private residence together in Robin's car in the early afternoon of February 8, 1993, that Robin's abandoned car was ob-served at approximately 4:30 that afternoon within walking distance of where her body was found, that a man matching Mason's description was seen in the same general area later that afternoon by two separate witnesses, and that Robin's husband Chris, who Mason contended was the murderer, was passed out drunk from early on the afternoon of February 8 until well after dark on that day. This evidence is sufficient to support the jury's conclusion that it was Mason who battered and killed Robin Dennis.

Mason's argument that his conviction should be re-versed based on insufficiency of the evidence is rejected.

VIII

Penalty-Phase Instructions

Mason argues that the trial court repeatedly erred in instructing the jury.

Voir Dire Instructions. Mason notes that in preliminary voir dire instructions, the trial judge stated that if Mason were found guilty, a second hearing would occur to consider sentence, but failed to tell the jury how it would determine whether to recommend death and implied that a finding of guilty on any charge could warrant the death penalty.

Because Mason failed to contemporaneously object, error, if any, is waived, unless rising to the level of plain error. *State v. Underwood, 3 Ohio St. 3d 12, 3 Ohio B. Rep. 360, 444 N.E.2d 1332*, syllabus. Despite Mason's complaint, the trial judge need not at that early stage completely instruct the jury, for example, by defining "aggravating circumstances" and "mitigating factors." The context of an instruction must be considered. *State v. Price (1979), 60 Ohio St. 2d 136, 14 Ohio Op. 3d 379, 398 N.E.2d 772*, paragraph four of syllabus. We find no plain error.

Failure to Define Mitigating Factors. The court instructed the jury to consider "mitigating factors including, but not limited to, the nature and circumstances of the offense and the history, character, and background of the Defendant, and any other factors that are relevant to the issue of whether the [*165] Defendant should be sentenced to death." Although the trial judge did not specifically define the term "mitigating factors," the instructions, considered as a whole, adequately guided the jury and did not restrict its consideration of mitigating evidence. See *State v. Wilson, 74 Ohio St. 3d at 397, 659 N.E.2d at 308; State v. Murphy (1992), 65 Ohio St. 3d 554, 577, 605 N.E.2d [**954] 884, 903; State v. Landrum, 53 Ohio St. 3d at 122, 559 N.E.2d at 727-728.*

Guilt-phase Evidence. The trial judge did not err in instructing the jury to consider testimony and exhibits "relevant to the aggravating circumstances and the mitigating factors which are admitted into evidence in the first phase of this case" in their

penalty deliberations. The prosecutor at the penalty phase may introduce any evidence from the guilt phase relevant to the aggravating circumstances. *State v. DePew (1988), 38 Ohio St. 3d 275, 528 N.E.2d 542*, paragraph one of the syllabus. *In State v. Woodard (1993), 68 Ohio St. 3d 70, 78, 623 N.E.2d 75, 81*, the court recognized that all exhibits from a trial's guilt phase "were relevant to the death penalty specifications * * * and to the nature and circumstances of the offense." Further, by relying upon residual doubt in arguing against the death penalty, Mason invited reconsideration of all guilt phase evidence.

Appeal. The trial court instructed the jury, over objection, that Mason's "right to appeal his conviction will not be limited in any way by your imposition of the death sentence. Secondly, you should not consider the subject of appeal in determining sentence." Mason provoked this instruction when he declared, in his unsworn statement, "All I'm asking for is you guys to not sentence me to death and give me one of the life sentences, so I will have a chance to bring this to Appeal Courts * * * . Give me the chance to take it through the Appeals Courts * * * ." The court's instruction was appropriate, accurately reflected the law, and did not diminish the jury's sense of its importance. Compare *State v. Phillips (1995), 74 Ohio St. 3d 72, 101, 656 N.E.2d 643, 669; State v. Rogers (1986), 28 Ohio St. 3d 427, 28 Ohio B. Rep. 480, 504 N.E.2d 52*, paragraph one of the syllabus, reversed other grounds (1987), *32 Ohio St. 3d 70, 512 N.E.2d 581*.

Aggravating Circumstances. The trial court did err in re-erring to "aggravating circumstances," when only a single aggravating circumstance existed. Nonetheless, this slip of the tongue did not constitute plain error, particularly as the trial court identified for the jury a single aggravating circumstance of felony-murder.

Mercy/Residual Doubt. Despite Mason's claims, the trial court need not instruct on mercy. *State v. Allen (1995), 73 Ohio St. 3d 626, 638, 653 N.E.2d 675, 687; State v. Lorraine (1993), 66 Ohio St. 3d 414, 417, 613 N.E.2d 212, 216.* Nor need the court instruct on residual doubt. *State v. McGuire, 80 Ohio St. 3d 390, 686 N.E.2d 1112*, syllabus.

[*166] Mason's contention that his conviction should be reversed based on error in instructions to the jury is rejected.

IX

Juror Bias/Deadlock/Misconduct

Juror Bias. Mason argues that he was denied a fair trial by an all-white jury because of racial prejudice.

In a hearing on a new trial motion, an alternate juror testified that during the trial after two or three days, some jurors made remarks she considered racist. An impaneled juror testified to hearing "racist remarks [said in] a jive manner," but stated that it had no impact on her or other jurors.

The overall record suggests that any such comments were isolated and did not demonstrate that the jury was racially prejudiced or that Mason

was denied a fair trial. Eleven jurors in affidavits all denied participating in or observing any racism. After considering the evidence, the trial judge concluded that "at no time during the trial did any of the jurors participate in any acts of racism which could have impaired the Defendant's ability to receive a fair trial." No reason exists to disturb the trial court's finding.

Jury Deadlock. Mason argues that if the jury reports a sentencing-phase deadlock, the court must then instruct the jury to consider only life sentences and cannot allow continued death-penalty deliberations.

After approximately four and one-half hours of deliberations at the penalty phase, the jury sent out a note stating, "We are unable to reach a unanimous decision on any one of the sentencing options. Please advise [**955] * * * ." Over defense objection, the trial judge then instructed the jury to continue deliberations but also instructed them, "If you decide that you cannot agree and that further de-liberations will not serve a useful purpose, you may ask to be returned to the courtroom * * * ." See *State v. Howard (1989), 42 Ohio St. 3d 18, 537 N.E.2d 188.*

The trial court then asked the foreman whether there was "a possibility * * * that after an additional period of time you may reach an agreement * * * [after] considering * * * the instructions?" The foreman answered "No," but he agreed to discuss with other jurors and "then return and respond to that question." At 5:00 p.m., the jury sent a note that they had made "some progress" and that it was "best to adjourn for the evening & resume

fresh in the AM." After returning the next morning, the jury indicated after thirty minutes or so that they had reached a verdict.

In *State v. Springer (1992), 63 Ohio St. 3d 167, 170, 586 N.E.2d 96, 99*, the court recognized that Ohio's death-penalty statutes do "not contemplate the possibility [*167] of a hung jury in the penalty phase of a capital murder trial." Hence, "when a jury becomes irreconcilably dead-locked during its sentencing deliberations * * * the trial court is required" to impose an appropriate life sentence. *Id.* at syllabus. In view of *Springer*, Mason argues that the court erred by using a modified *Howard* charge, and contends that the court "should have told them to consider the two life options or should have sentenced Mason itself."

No exact line can be drawn as to how long a jury must deliberate in the penalty phase before a trial court should instruct the jury to limit itself to the life sentence options or take the case away from the jury, as done in *Springer*. Each case must be decided based upon the particular circumstances. Here, after only four and one-half hours of deliberations, the trial court acted appropriately by giving a modified *Howard* charge. The circumstances show that the jury was not irreconcilably deadlocked, and the modified *Howard* charge did not coerce a death verdict.

Further, this court has approved using supplemental instructions urging jurors to continue deliberations to try to reach a unanimous penalty verdict. See, *e.g., State v. Tyler (1990), 50 Ohio St. 3d 24, 26, 553 N.E.2d 576, 582-583.* Such

supplemental instructions to a jury considering the death penalty do not violate due process. *Lowenfield v. Phelps (1988), 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568.*

Jury Misconduct. Mason argues jury misconduct and con-tends that the trial court's reliance on the *aliunde rule, Evid.R. 606(B)* (limiting evidence about jury's deliberation), denied him a fair trial. The *aliunde* principle protects the privacy of a jury's deliberations from inquiry and promotes the finality of jury verdicts. See *State v. Adams (1943), 141 Ohio St. 423, 25 Ohio Op. 570, 48 N.E.2d 861.*

After receiving evidence at a hearing held on a motion for new trial filed by Mason, the trial court found insufficient evidence that any juror "had failed to keep an open mind so as to be able to fairly decide * * * this case." The trial court further found that all jurors "were awake and attentive during all proceedings of the trial," and that the actions of one juror in "reporting * * * that she had disassembled her husband's revolver did not influence the verdict * * * [and Mason] was not prejudiced by this conduct." As to all of Mason's claims of misconduct, he has failed to establish any prejudice arising from the asserted misconduct. See *Crim.R. 33(A); State v. Hipkins (1982), 69 Ohio St. 2d 80, 83, 23 Ohio Op. 3d 123, 125, 430 N.E.2d 943, 945-946.*

At the post-trial hearing, Mason also wanted to in-quire into jury deliberations especially on the death penalty. Yet the trial court correctly ruled that Mason had presented no evidence of outside influences so as to avoid *Evid.R. 606(B).* No exception to the *aliunde* rule of evidence is

appropriate simply for murder cases. Mason does not have a constitutional right to know the nature of jury [*168] discussions during deliberations. Thus, Mason's contentions lack merit and are rejected.

[**956] X

Ineffective Assistance of Counsel

Guilt Phase. Mason complains that his counsel was ineffective in that he disclosed to the jury that Mason was on parole when arrested on February 12, and that his parole was thereafter revoked.

Yet the disclosure may well have been made for tactical reasons. Mason's defense theory was that police rushed to judgment and did not adequately investigate Robin's murder because Mason was on parole. Moreover, the state would inevitably have proved Mason's felony convictions to impeach his credibility as a witness. *Evid.R. 609.* Further, the state could prove both convictions, since Mason was charged with having a weapon under disability. *R.C. 2923.13(A)(2)* and *(3).* Mason simply took the sting out of the evidence by early disclosure. *State v. Tyler, 50 Ohio St. 3d at 34, 553 N.E.2d at 590.*

As to other aspects of his counsel's guilt-phase performance, no ineffectiveness has been demonstrated, and Mason's complaints lack merit. Trial counsel presented a strong, vigorous, thorough, and aggressive defense before and during the trial. Counsel also developed a "coherent and consistent defense theory" that Mason was innocent and Chris Dennis was guilty. See *State v. Ballew (1996), 76 Ohio St. 3d 244, 256, 667 N.E.2d 369, 381.* Mason's

conviction demonstrates that the jury simply accepted the state's interpretation of the evidence, and rejected the theory presented by the defense. Counsel's performance did not fall "below an objective standard of reasonable representation." *State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373*, paragraph two of the syllabus. We have reviewed each of a number of instances Mason claims illustrate ineffective assistance of counsel and find nothing reflecting "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment to defendant." *Strickland, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.*

Nor has Mason brought forth any conduct on the part of his counsel demonstrating prejudice, "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373*, paragraph three of the syllabus.

Penalty Phase. Mason argues that his counsel failed to investigate and present a life history of Mason and his psychological background so that he would not receive the death penalty. Mason also complains about the paucity of mitigation evidence presented in defense.

[*169] The record, however, suggests that defense counsel had voluminous records about his history and background. Counsel prepared twelve exhibits documenting aspects of Mason's childhood, such as reports that he was beaten by his father and released by his parents to juvenile authorities, as well as early psychological evaluations, but did not

present them to the jury. Mason argues that these exhibits show that a cogent, persuasive mitigation case could have been built revealing Mason's childhood exposure to violence, his dysfunctional family, and his early emotional and psychological problems.

But the records also show prior involvements with the criminal and juvenile justice systems, and other unfavorable matters. Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal.

Similarly it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation. We will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently. *State v. Post (1987), 32 Ohio St. 3d 380, 388, 513 N.E.2d 754, 762.*

Nor has Mason shown prejudice, the second Strickland requirement, namely "a reasonable probability" that different tactical choices at the penalty phase would have made a difference in the result. See *State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373*, paragraph three of the syllabus.

[**957] XI

Constitutionality

Mason's attack on the constitutionality of Ohio's death-penalty statute is summarily rejected. *State v. Jenkins, 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264; State v. Poindexter (1988), 36 Ohio St. 3d 1, 520 N.E.2d 568*, syllabus.

XII

Independent Sentence Evaluation

Sentencing Evidence. Mason's mother, older brother, who was a prison guard, and his older sister all testified on Mason's behalf and pleaded with the jury not to impose the death penalty. His mother said he was a good son, and she loved him deeply. His sister also loved him very much and thought Mason was not a bad person.

A cousin testified that she believed the state's correctional system had failed Mason and that he deserved another chance to be rehabilitated. Two deputy sheriffs testified that while Mason had been in jail for over a year, he had not been a problem as an inmate even on escorted trips.

[*170] His wife, Terry Mason, pleaded with the jury "not to kill" Mason. She testified that Mason was her reason for living and without him she could not go on. On cross-examination, Terry agreed that Mason was not at home when she arrived there around 4:15 p.m. on February 8, 1993. Mason came home around 5:30 p.m., then left, and did not return until later that night. Mason had done some drawings that his wife and others thought showed great artistic promise.

In an unsworn statement, Mason begged for his life on the basis that he had not killed Robin. He

wanted a life sentence so he would "have a chance to bring this to Appeal Courts, * * * [which would] weigh the evidence all over again, and see that I didn't have nothing to do with that girl's death." Further, Mason said, "I know, God knows, and everybody who knows me knows, I don't have to answer to you guys no more. I already answered to him."

Sentence Evaluation. After independent assessment, we find that the evidence is sufficient to prove the aggravating circumstance of felony-murder.

As to possible mitigating factors, nothing in the nature and circumstances of the offense appears mitigating.

Mason's history and background provide a few mitigating features. His wife, mother, and other family members love him and do not want him executed. Also, he may have artistic talent.

At trial, Mason relied upon residual doubt. In the syllabus to *State v. McGuire, 80 Ohio St. 3d 390, 686 N.E.2d 1112*, however, this court held that residual doubt can no longer be deemed a mitigating factor.

Mason's adjustment to jail is a mitigating factor, but no other features of this case appear as mitigating "other factors" under *R.C. 2929.04(B)(7)*.

The aggravating circumstance outweighs the extremely modest mitigating factors presented. Mason was convicted of raping Robin Dennis, strangling her, and beating her to death. Even when considered collectively, the mitigating factors are not

of great weight. Thus, the specified aggravating circumstance outweighs the mitigation beyond a reasonable doubt, and the death penalty is appropriate.

We find that that death sentence in the case at bar is proportionate to penalties in other cases we have re-viewed. See, *e.g., State v. McGuire, 80 Ohio St. 3d 390, 686 N.E.2d 1112* (mitigation evidence of turbulent child-hood); *State v. Phillips, 74 Ohio St. 3d at 104-106, 656 N.E.2d at 671-672* (nineteen year old, no significant criminal record, hard worker, low intelligence, deprived childhood); *State v. Gumm, 73 Ohio St. 3d at 432, 653 N.E.2d at 270* (deprived childhood, retardation, no criminal history).

Imposing the death penalty in this case is neither excessive nor disproportionate when compared with similar felony-murder cases. See *McGuire, Phillips,*[*171] *Gumm, supra; State v. Durr, 58 Ohio St. 3d 86, 568 N.E.2d 674; State v. Henderson, 39 Ohio St. 3d 24, 528 N.E.2d 1237; State v. Apanovitch (1987),* [**958] *33 Ohio St. 3d 19, 514 N.E.2d 394; State v. Steffen, 31 Ohio St. 3d 111, 31 Ohio B. Rep. 273, 509 N.E.2d 383.*

Accordingly, Mason's convictions and death sentence are affirmed.

Judgment affirmed.

DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

APPENDIX H

[letterhead]

January 19, 1994

Mr. Ted Coulter
COULTER, PHILLIPS & YAGER
383 S. Main Street
Marion, Ohio 43302

Re: Additional Discovery

Dear Mr. Coulter:

Although in my opinion we are not required to provide this information to you either under Crim. R. 16 or R.C. 149.43, I have enclosed for your reference copies of documents we obtained previously in this case from various entities which provide additional background information on your client. I thought that by providing this information, it should lessen the need for additional investigative assistance in the mitigation phase of this case. (Of course, we obtained these documents without the guidance of a "mitigation specialist" and through the mere unsophisticated use of subpoena duces tecums). These documents are listed as follows:

The following are documents obtained from the Ohio Adult Parole Authority through a subpoena:

No Date. Visiting list for Maurice Mason at the Institution. Includes Ruby Mason, James Mason, Michelle Floyd, Sister Hatch, Fred Zeigler, Nicole Cofer, and Nancy Fortner.

Document dated 12/05/88. Appears to be a prison document indicating charges that Mason went to prison for.

Document dated 12/05/88. Criminal history of Maurice Mason.

Document dated 12/05/88. Admission document to CRC.

Document dated 12/05/88. Health history of Maurice Mason.

Document dated 12/05/88. CRC document. Brief psychological interview, information not verified. Indicates substance abuse history of coke.

Document dated 12/21/88. Test information on Maurice Mason. Unable to determine what type of test this is. However, it appears to be evaluating some academic skills.

Document dated 01/31/89. Memo regarding Mason from Carrie Breyman, Recovery Services Coordinator, regarding attendance at the substance abuse program. Comments are that attendance has been somewhat sporadic since completing the Interface Program.

Document dated 01/31/89 - 04/15/91. Assignment record. Appears to be the work-related activities that Mason had in prison.

Document dated 02/14/89. Family history of Maurice Mason.

Document dated 02/14/89. Employment history of Maurice Mason. Document indicates that Mason went out on his own at an early age, supported himself on dope sales.

Document dated 02/14/89. Admission Center. Document indicates that Mason was in a common

law relation with Nicole Cofer, who was at that time a student at BGSU.

Document dated 02/14/89. Inmate Treatment Plan. Appears this document was prepared in connection with a parole hearing 3/16/90.

Document dated 05/04/89 - 01/21/90. Offense record. This document indicates eight offenses while in the institution.

Document dated 06/18/89. Inmate Treatment Plan. Apparently a document prepared in connection with a parole hearing.

Document dated 10/30/89 - 12/22/89. Certificate of Participation in Interface, a substance abuse treatment program presented to Maurice Mason.

Document dated 10/30/89 - 12/22/89. Inmate Evaluation report. This was completed by Carrie Breyman. Evaluation rating was 55 which indicates average to above-average performance in the Interface Program.

Document dated 01/08/90. Lima Correctional Institution. Document from Inmate Health Services regarding medical transport of Maurice Mason to dermatology clinic.

Document dated 01/26/90. Letter to Mason from Carrie Breyman, Recovery Services Coordinator regarding Interface Substance Abuse Program. Comments are Mason works a good recovery program and works well as a sponsor.

Document dated 04/23/90. Inmate Health Services medical transports to dermatology clinic at Lima Correctional Institution.

Document dated 04/30/90. Inmate Health Services medical transport to dermatology clinic.

Document dated 01/06/91. Subpoena duces tecum to Patricia Jones from Division of Parole.

Document dated 01/17/91. Investigation request from Lima Correctional regarding Maurice Mason. This document is regarding plans for Mason while on parole.

Document dated 01/29/91. Memo to Maurice Mason from Carrie Breyman, Recovery Services Coordinator. This is regarding verification of attendance of the substance abuse program.

Document dated 03 /21/91. Inmate Evaluation report regarding Mason job assignment cafe. Reviewed by Sgt. Peans. Total evaluation rating was 49. Performance is scaled rating on 1 to 10 with 10 being the highest. Mason is given 7's.

Document dated 04/16/91. Parole planning and parole plan supplement.

Document dated 05/16/91. Conditions of Supervision and Authorization to Release Information in State v. Reece; Waiver of Extradition (Parole).

Document dated 05/28/91. Ohio Adult Parole Authority Case Assignment Form. Case Officer assigned was Bill Cutler.

Document dated 06/11/91. Memo to Raymond Capotes, Parole Board Chairman, from Harold Soyz, Placement Coordinator, regarding Maurice Mason. Memo is advising that Mason's brother Richard Craig Mason had died. Funeral scheduled for 6/13/91. Memo was regarding advance parole date to 6/12/91.

Document dated 06/21/91. Assessment of Client Risk Maurice Mason completed by Officer Cutler. Also a case plan indicating that one of the objectives was for the client to remain drug free for six months, attend Marion Area Counseling Center and AA/NA meetings, register with OBES and obtain employment, and to choose peers more wisely.

Document dated 06/25/91. Document from the Adult Parole Authority to the Marion Police Department ordering a parole holder. This report indicates that under additional information that Mason was associating with John Wright.

Document dated 06/27/91. Letter to Officer Cutler from Sandra Allen, MedCenter Behavioral Services, MedCenter Hospital. Letter indicates that Mason had presented himself requesting information on services available through MedCenter. Mason had apparently requested drug rehab services but since he had not been a user for three years, according to his information, he was not eligible for services. Recommendations were (1) random urine screens, (2) verification of attendance at support group meetings, (3) refer client to treatment should he return to drug using behaviors.

Document dated 06/28/91. Certificate of Parole Release Authorization for Maurice Mason. Mason was released to the home of his mother at 462 N. Greenwood Street.

Document dated 07/12/91. Alleged parole violation supervision summary. Mason was apparently arrested on 7/7/91 by the Marion County Sheriff's Department on an aggravated menacing in which he was charged in Marion Municipal Court. Violations include possession of a firearm on or about 7/7/91 and hiding from a Marion Police Officer on 7/7/91. Apparently Maurice Mason pulled a gun on the victim Patricia Jones in the presence of Barbara Jones. It was recommended by Officer Cutler that Mason be returned to the institution.

Document dated 07/16/91. Subpoena duces tecum to Barbara Jones from Division of Parole.

Document dated 07/16/91. Subpoena duces tecum to Dep. G. L. Collins.

Document dated 07/30/91. Letter to Lee Sampson from Terry Lukuch, Case Analyst, Parole Supervision Section. Letter authorizes return of Mason to CRC in connection with his parole violation.

Document dated 08/07/91. Reassessment of client risk completed by Officer Cutler.

Document dated 08/20/91. Letter to Maurice Mason from Terry Lukuch, Attorney Hearing Officer, Ohio Department of Rehabilitation and Correct. This letter is a review of the on sight parole revocation hearing in which Mason was represented by Attorney Sara Babich. Letters contains a review

of the testimony at that hearing. This letter notifies Mason that the attorney found probable cause in both violations.

Document dated 07/06/92. Certificate of Parole Release Authorization

Document dated 07/06/92. Notification to James Slagle, Prosecuting Attorney, of the release of Maurice Mason.

Offense record. This appears to be a prison document of 05/04/89 through 11/21/90. Dates of offenses were as follows: 5/4/89 Class 2 violation, being out of place and unauthorized use of telephone and a violation of any published institutional rule, regulation or procedure. 6/13/89 a violation of Rule 8, possession or manufacture of a weapon or contraband. 9/17/89 giving false information or lying to departmental employees. 9/24/89 being out of place. 10/16/89 possession or manufacture of weapon or contraband. Charged as violation of any published institutional rule, regulation, or procedure. 5/18/90 disobedience of a direct order which shall include aggravated insubordination and possession or manufacture of a weapon or contraband which shall include any article knowing possessed or which permission has not been given. 11/17/90 possession or manufacture of a weapon or contraband. 11/21/90 character of offense indicates modify.

Document dated 07/20/92. Adult Parole Authority filed record.

Document dated 07/20/92. Placement Investigation request completed by Doug Schiefer. It appears that Mason is being released to live with his

wife Terry Lee Mason. Conditions are that he successfully complete substance abuse program, be at his residence on 7/21/92 for a home visit by Officer Schiefer.

Document dated 07/23/92. Assessment of client risk.

Document dated 10/21/92. Case record audit completed by Officer Schiefer.

Document dated 12/01/92. Arrest report, Adult Parole Authority. Notification of parole violation in that Mason was arrested by the Marion Police Department for making an improper right turn and was found to be under suspension.

Document dated 01/28/93. Document is arrest supplement completed by Doug Schiefer, Adult Parole Authority. This report is regarding a traffic violation in which Maurice Mason was stopped by Scott Blough, Marion Police Department. He was cited for improper turn and driving under suspension. Officer Blough did notice an odor of alcohol but, Mason passed sobriety test.

On 11/24/92 the subject appeared at Marion Municipal Court having been cited for DUS. He pled guilty and was sentenced to serve 10 days—seven suspended and three enforced. He was to enter the Marion County Jail on 12/4/92 at 6:00 P.M. but he failed to appear at the jail and the parole officer had trouble finding Mason until 12/22/92. Mason did enter the jail 1/6/93 and served three days and was given an additional three days for his failure to appear at the jail.

Document dated 2/10/93. Official complaint report. This is the report from the Marion County Sheriff's Department about Robin Dennis being missing.

An article from The Marion Star written by Dave Scholz regarding homicide suspect held on handgun violation.

Document dated 2/25/93. Alleged parole violation and supervision summary by Doug Schiefer indicating arrest date 2/12/93. Warrantless violations of parole which include associating with persons with criminal backgrounds, consuming intoxicating liquors, possessing firearm, possessing narcotic drugs, failure to submit to a search of his body.

Letter dated 12/10/92 to Doug Schiefer from Terry Mason regarding her husband Maurice Mason. This letter was giving reasons that Maurice did not show up at the Marion County Jail for the traffic violation when he was suppose to.

Letter dated 1/6/93 to Doug Schiefer from Terry Mason regarding setting up counseling sessions and finding a job for Maurice Mason.

Records requested from the Marion City Schools

School record consists of two pages indicating grades. History on the report is as follows: 8/25/79 the Ohio Youth Commission; 2/22/79 Lowell Titus, Juvenile Court; 1/2/80 re-entered from Ohio Youth Commission; 2/20/80 withdrawal from Ohio Youth Commission; 9/30/80 re-entered Harding High School; 4/22/82 unknown; 6/29/83 OSUM; 7/12/85

Ashland College; 11/7/91 Ohio Department of Rehabilitation.

The following records were received from the Marion County Board of Children Services:

8/2/77 - Marion County Sheriff's Report complaint of assault. Victim is Maurice Mason. Defendant is father James M. Mason. Incident occurred at Marseilles-Galion Road, East, west of Lucas Road. Apparently Maurice was using his mother's bicycle and it was either lost or stolen. Father became angry with him, took him out on Marseilles-Galion Road to whip him and Maurice ran away from him and ran into a corn field. Police were called by a neighbor in the area of Marseilles-Galion Road. Maurice was taken to Waddell Village and Mr. Mason was arrested for assault.

Document dated 8/2/77. Confidential report of actual or suspected child abuse.

Document dated 8/2/77. Marion General Hospital Emergency Room report, unable to read.

Document dated 8/2/77. Voluntary statement by James Michael Mason to the Marion County Sheriff's Department.

Document dated 8/9/77. Case notes by Michael Ring, Caseworker, regarding the assault incident between James Mason and Maurice Mason.

Document dated 8/10/77. Service request or complaint form. Investigator Michael Ring.

Document dated 9/20/77. Letter to Whom It May Concern from Michael Ring regarding rearranging James Mason's hours of employment.

Document not dated. Fact sheet for case record of Marion County Children Services Board on Maurice Mason. Handwritten notes appear to be the writing of Mike Ring.

Document dated 2/21/78. Agreement for temporary care of child. Reason Maurice will not go to school and will not stay at home.

Document dated 2/22/78. Health evaluation form on Maurice Mason.

Document dated 3/10/78. Referee's Report and Recommendation from Marion County Juvenile Court.

Document dated 3/13/78. Notes from Mike Ring, Caseworker, Marion

County Children Services. Notes indicate that Maurice Mason came in to Waddell Village on 2/22/78 due to problems that he was experiencing at home. He ran away on 2/28/78 but was apprehended by the Sheriff's Department the same day, initially taken to detention and returned to the Village the same. On 3/5/78 Maurice ran away again but appeared back on the grounds the same day. 3/7/78 call was received from the schools that Maurice was stealing from school lockers. He was placed in detention but later released to the Village. 3/13/78 Maurice ran away from school Recommendation is that time was evaluation at the Child Study Center of the Ohio Youth Commission. 3/17/78 Maurice went home for a weekend visit with his family. 3/19/78 Maurice refused to return to the Village. 3/28/78 Maurice did not return to his parents' home, they are unable to locate him. Parents were getting

ready to file an unruly complaint with the prosecutor and they were unable to locate Maurice. 4/14/78 Maurice is committed to the temporary care and custody of the Ohio Youth Commission at the Child Study Center. Children Services closed their case.

Document dated 3/20/78. The agreement was terminated due to Maurice not being cooperative at the Village.

Prior Police Reports involving Maurice Mason:

Document dated 2/13/80. Complainant Roy Russell. This was a breaking and entering of a garage at 550 E. George Street. I believe this offense was committed when Maurice was a juvenile. All indications are that this record was expunged and there is no mention of Mason's name in the report. However, the police computers refer to Mason when calling up this report.

Document dated 1/28/84. Complaint burglary at 636 Oak Street. Maurice Mason was arrested in connection with this report and I believe this was Mason's initial offense, Marion County Case No. 84-CR-20. Basically, Mason breaks into a garage and then his footprints are tracked back to his home.

Document dated 2/05/88. Complainant is Billie Miller. The victim is Tracy Miller. Billie Miller was the mother of Tracy Miller. She had recently been called out to Marion General Hospital and learned that Tracy was in serious condition. Apparently Tracy and her roommate Sue McGowan were partying with Maurice Mason one evening. The story was that Tracy was high on drugs and alcohol, went out onto the roof, and apparently fell off the

roof. She was taken to the hospital by McGowan and Maurice Mason. They advised hospital personnel that it was an accident. No report was made to the police at that time. This incident happened on 2/04/88. The mother was called 2/05/88 and then went to the police indicating that she thought there was some foul play. Apparently, the police did investigate this situation. No one was charged. Maurice Mason and Sue McGowan, however, are listed as suspects in the police report.

Document dated 8/10/88. Offense is sale of cocaine. Victim in State of Ohio. In this incident Maurice Mason sold cocaine to undercover agents Scott Supplee and Agent Wayne and Agent Steve Frank of A.T.F. Mason was charged and convicted of aggravated trafficking, Marion County Case No. 88-CR-267.

The following documents were received from the Ohio Department of Rehabilitation and Correction:

Document dated 4/04/84. Marion County Sheriff's Department inmates sentence credit. Maurice Mason arrived at the Marion County Jail 3/29/84 and is credited with six days.

Document dated 6/07/84. Columbus Correctional Facility indicates receipt of records and materials to the institution.

Document dated 7/06/84. Columbus Correctional Facility. Transfers to Ohio State Reformatory receipt of inmates including Maurice Mason.

Document dated 5/24/84. To R.T. Overberg, Chief, Bureau of Classification, Department of Rehabilitation to T.D. Taylor, Superintendent, Columbus Correctional Facility regarding Maurice Mason authorized to transfer Maurice from the Columbus Correctional Facility to the Ohio State Reformatory because Mason was underage and the first felony commitment.

Document dated 5/23/84. To Roger Overberg, the Department of Rehabilitation, from Stephanie Sue Walker, Reception Coordinator, regarding administrative transfer of Maurice Mason to the Ohio State Reformatory.

Document undated. Computation work sheets. Documents computes minimum or definite sentence in the penitentiary.

Document undated, Admission Worksheet. Maurice Mason.

Document dated 4/04/84. Maurice Mason appears to be admission document.

Document dated 6/07/84. Computation worksheet of minimum or definite sentence for Maurice Mason.

Document dated 7/19/84. Inmate orientation verification sheet for Maurice Mason.

Document dated 7/19/84. Ohio Department of Rehabilitation and Correction inmate evaluation report on Mason. Mason evaluated at five on a rating from one to ten, with ten being the highest score.

Document dated 5/20/84. Ohio Department of Rehabilitation and Correction form admission to OSU Hospital. Reason: lymph node biopsy.

Document dated 4/17/84. Office communication to Lt. Smith from T.D. Taylor, Superintendent, regarding official visit Maurice Mason.

Document dated 4/17/84. Memo regarding Inspector Edwin Whipple and Detective Richard Thompson of the Marion City Police Department interviewing Maurice Mason on 4/17/84.

Document dated 4/17/84. Inmate consent form. Mason consents to see Whipple and Thompson.

Document dated 4/4/85. Ohio State Reformatory notification of physical therapy for Maurice Mason.

No date. B.C.I. final disposition report to B.C.I.

Document dated 4/01/87. Ohio State Reformatory office of record clerk notification of Mason being released on furlough 4/6/87 to a halfway house in Columbus.

Document dated 2/09/87. Reclassification Committee appeal. This document is concerning former write ups Mason had in the institution. Response made 3/4/87 by managing officer. Signature cannot be read. He indicates that Mason had been written up 14 times in the past year and he indicates that Mason's poor institutional behavior is the reason he was raised to an E.

Document dated 11/10/86. To Inmate Personnel Office from Mason request for housing in a four-man cell.

Document dated 5/11/86. Ohio Department of Rehabilitation and Correction decision of Review/Furlough Committee. Recommend Parole Board hearing to be scheduled.

Document dated 10/27/86. Notification of furlough consideration.

Document dated 3/12/86. Notification of oral surgery for Mason.

Document dated 1/17/86. Classification and Reclassification minutes. Mason requests a better job to be classified.

Document dated 11/13/85. Mason has appointment for oral surgery.

Document dated 8/12/85. Mason asked to be reclassified in connection with the job change.

Document dated 8/5/85. Ohio Department of Rehabilitation and Correction inmate evaluation sheet. Mason is rated as a six on a scale of one to ten. This is in connection with job transfer.

Document dated 3/26/85. Classification and Reclassification minutes. Mason's request is denied.

Document dated 4/6/87. Notification of Mason of violation of furlough agreement rules.

Document dated 6/16/87. Notification of furlough violations, specifically drug usage.

Document dated 6/19/87. Adult Parole Authority waiver of release violation preliminary hearing.

Document dated 7/13/87. Mason is declared parole violator. Document is a memo to the Ohio State Reformatory from Roger T. Overberg.

Document dated 7/8/87. Letter to John Walker, Unit Supervisor, Columbus, Ohio, Adult Parole Authority, from Jerry Hillerson, Coordinator, Furlough Program. This letter is regarding Mason being a furlough violator and being returned to Ohio State Reformatory.

Document dated 8/24/87. Ohio Department of Rehabilitation and Correction request for counsel at furlough hearing.

Document dated 6/18/87. Adult Parole Authority to Maurice Mason notification of on sight hearing. Notification of substitution of judicial hearing for on sight hearing regarding new criminal charges. This is in connection with violation of furlough.

Document dated 10/26/87. Certificate of parole/release authorization granted to Maurice Mason.

Document dated 11/87 to Lima Regional Office regarding Maurice Mason. Appears to be information in connection with Mason obtaining parole.

Document dated 11/2/87. Adult Parole Authority. Type of report is close of interest Maurice

Mason. Mason is transferred from furlough to parole.

Document dated 11/13/87. Document from Office of the Record Clerk. Mason is released on parole from furlough effective 11/2/87.

Document dated 10/20/87. Adult Parole Authority list of persons obtaining parole including Mason.

Document dated 8/28/87. Ohio State Reformatory Office of Record Clerk. Person Mason to be released to on furlough effective 9/1/87.

Document dated 9/01/87. Certificate of Furlough granted to Maurice Mason.

Document dated 7/28/87. Adult Parole Authority to Eric Dahlberg, Superintendent, Ohio State Reformatory, from Raymond Capotes, Chairman, Ohio Parole Board, regarding Maurice Mason. Memo indicates that Mason is being returned to the Ohio State Reformatory as a parole violator.

Document dated 7/24/87. Type of report alleged furlough supplement and close of interest Maurice Mason. Report indicates that Mason is returning to the institution for a furlough violation hearing at Ohio State Reformatory.

Document dated 6/7/84. This appears to be an institution document that lists Mason's status on furlough or parole.

Document not dated. Admission System Inmate Information Display. This is identifying information on Mason within the institution.

Document dated 12/5/88. Document is from the Marion County Jail indicating jailtime credit to Orient Correctional Facility.

Document not dated. Pre-Parole Planning Document on Maurice Mason.

Document not dated. Parole Plan Supplement.

Document dated 12/21/89. Classification and Reclassification Committee Report. Mason. Discussion from Substance Abuse Committee decision to Program Aide in Substance Abuse.

Document dated 10/26/89. Classification and Reclassification Committee Report. Discussion from Food Service worker to Substance Abuse.

Document dated 10/12/89. Classification and Reclassification Committee Report on Mason from Food Service worker to no action.

Document dated 10/05/89. Classification and Reclassification Committee Report on Mason from Assistance Cook to Food Service worker.

Document dated 8/29/86. Lima Correctional Institution Supervision Review Committee Report.

Document dated 6/29/89. Classification and Reclassification Committee Report. Mason job change from Food Service worker to Cook Assistant.

Document dated 1/25/89. Bureau of Classification and Reception, Division of Institutional Programs, regarding inmate transfers from CRC to Lima Correctional.

Document dated 1/09/89. Maurice Mason release consideration form.

Document dated 1/06/89. Parole and Risk Assessment and Aggregate score.

Document dated 12/05/88. Admission system inmate information display Maurice Mason.

Document dated 12/12/88. Maurice Mason update and correction of inmate file. This is to include the current charge of aggravated trafficking, Marion, 88-CR-267.

Document dated 12/12/88. To Inmate Mason from Record Office. Subject: Aggregation. Your old file and new file have become aggregated. Changes made as follows: Crime - aggravated trafficking consecutive with burglary.

Document dated 1/15/91. Pre-Parole Planning Maurice Mason.

Document dated 1/07/91. Classification and Reclassification Committee Report. Name: Mason. Job Change: Findlay College to Food Service worker.

Document dated 8/23/90. Classification and Reclassification Committee Report. Mason. Job change from Food Service worker to student Findlay College.

Document dated 5/31/90. Classification and Reclassification Committee Report. Mason. Job change from Substance Abuse Program Aide.

Document dated 2/13/90. Maurice Mason Parole Board Risk Assessment aggregate score.

Document dated 1/29/90. To Presiding Judge, Court of Common Pleas Marion County and Prosecuting Attorney, Marion County, Ohio from Ohio Adult Parole Authority, notice of hearing on Maurice Mason on 88-CR-267, 12/5/88, two year definite; 84-CR-20, 2/5/88, burglary.

No date. Appears to be some type of identification with right thumb print.

No. date. Some type of identification with Maurice Mason's picture.

Document dated 5/30/91. To Lima Correctional Institution from Bureau of Classification and Reception transferring Maurice Mason to Pickaway Pre-Release Center 6/7/91.

Document dated 5/16/91. Parole Board Risk Assessment aggregate score on Maurice Mason.

Document dated 4/24/91. To Presiding Judge Common Pleas Court, Marion County, Ohio, and Prosecuting Attorney Marion County, Ohio from Ohio Adult Parole Authority. Notice of parole hearing Maurice Mason on the aggravated trafficking and burglary charges.

Document dated 4/16/91. Maurice Mason Pre-Parole Planning Adult Parole Authority.

Document dated 4/11/91. Classification and Reclassification Committee Report for Mason job change. Job change discussion PTR/Dorm to Clerk/General Clerk.

Document dated 3/28/91. Classification and Reclassification Committee Report. Mason from Food Service worker to PTR/Dorm.

Document dated 2/11/91. Maurice Mason Parole Board Risk Assessment and aggregate score.

Document dated 1/14/91. To Presiding Judge of Marion County Common Pleas Court, Prosecuting Attorney, Marion County, Ohio, from the Ohio Adult Parole Authority.

Document dated 1/14/91. Notice of parole hearing Maurice Mason, aggravated trafficking and burglary.

Document dated 8/06/91. To L.C.I. from Barbara Trecho, Record Clerk, authorization to transfer institutional files for Maurice Mason.

Document dated 8/01/91. To Warden, Correctional Reception Center, from Roger Overberg, Bureau of Examination Classification. Subject: Parole Violator Maurice Mason. Notification that Maurice Mason was a parole violator and that they would receive back to the institution.

No date. Adult Parole Authority Special Minutes. PV regarding Maurice Mason. Paroled on 6/12/91 and on 7/29/91 he had violated his parole. Form declared Maurice Mason a parole violator effective 7/7/91.

No date. Final disposition report on Maurice Mason, paroled 6/12/91.

Document dated 6/11/91. Adult Parole Authority. Maurice Mason granted parole 6/12/91.

Document dated 7/30/91. Letter to Lee Sampson, Adult Parole Authority, from Terry Lukuch, Case Analyst, Parole Supervision Section.

Letter notifies Mr. Sampson that Maurice Mason is a parole violator.

Document dated 8/29/91. Ohio Department of Rehabilitation and Correction, Adult Parole Authority. Maurice Mason request for counsel at parole revocation hearing. Mason did not desire legal counsel with option to amend.

Document dated 5/06/92. Maurice Mason Pre-Parole Planning.

Document dated 5/07/92. Case Manager J.M. Wilson. Information on Maurice Mason including placement and employment plans.

Document not dated. London Correctional Institution. Mason. Lists previous convictions out of Marion County, both burglary and aggravated trafficking.

Document dated 11/06/91. Memo to Stephen Dorsey, Deputy Warden, from George Alexander, Warden. Subject: Maurice Mason Inmate Marriage Ceremony Arrangements and Gate Pass. Relaying information regarding the marriage of Terry Arthur and Maurice Mason. Ceremony to take place on Saturday, November 9, 1991, at 8:00 P.M. Marriage to be held in the stockade visiting room.

Document dated 9/03/91. To Melody Turner, Warden, CRC, from Raymond Capotes, Chairman, Ohio Parole Board, regarding Maurice Mason, notifying that Mason had been returned to the institution as a parole violator.

Document dated 10/01/91. Letter to Terry Arthur regarding marriage to Maurice Mason from George Alexander, Warden.

Document dated 9/12/91. Ohio Parole Board Release Consideration for Maurice Mason. Notification next hearing will take place 5/92.

No date. Placement Investigation Request. Maurice Mason. Institution: London Correctional.

Document dated 5/19/92. Adult Parole Authority conditions of supervision parole.

No date. State of Ohio Department of Rehabilitation and Corrections Admission Center CRC. Admission date: 8/7/91. Current charge: aggravated trafficking consecutive with burglary, Maurice Mason.

No date. Maurice Mason family history.

Document dated 8/08/91. Maurice Mason inmate family notification form. Temporary visiting list.

Document dated 5/17/92. Ohio Department of Rehabilitation and Correction. L.O.C.I. treatment program summary. This document appears to give description of treatment programs offered by the institution.

Document dated 1/31/89- 6/07/91. Assignment record, Mason. This document shows work assignments while at the institution.

Document dated 5/05/92. Inmate Evaluation report Mason. Mason is given nines and eights on a score of one to ten, with ten being the highest.

Evaluator comments: that the man does a good job at the power house.

Document dated 5/22/92. Inmate transfer medical information sheet to Ohio Adult Parole Authority from London Correctional regarding Maurice Mason. No medical problems indicated.

Document dated 12/05/88. Maurice Mason. Appears to be an activity report from the institution.

Document dated 5/19/92. Ohio Department of Rehabilitation and Correction. Authorization to Release Information and State Release.

Document dated 5/19/92. State of Ohio Waiver of Extradition. Parole from Maurice Mason.

Document dated 5/19/92. Parole Board Risk Assessment. Aggregate score.

Document dated 11/17/90-11/21/90. Individual segregation record sheet regarding Mason.

Document dated 5/18/90 - 5/24/90. Individual segregation record sheet.

Document dated 5/18/90 - 5/23/90. Individual segregation record sheet.

Document dated 9/23/91. London Correctional Institution receipt for Inmate Handbook.

Document dated 4/06/87. Ohio State Reformatory Deputy's Order to Release. This was release to furlough.

Document dated 3/16/90. To I.P.O. from Carrie Breyman, Recovery Services Coordinator. Subject: Bed Moves. Please request to move Mason from 5-21 to 5-51 effective immediately.

Document dated 5/16/91. Someone's handwritten notes, apparently at a Parole Board Hearing. Notes are on various work positions Mason had while at the institution.

Document dated 8/13/84. Letter to Mr. and Mrs. James Mason from Greg Huddle, Social Services Department, regarding parents inconsistent contact with Maurice.

Document dated 1/14/85. Letter to Mr. and Mrs. James Mason from Greg Huddle, regarding Maurice. This letter is regarding parents not writing Maurice.

Document dated 8/21/87. To the visiting officer regarding the clerk going in and issuing a marriage license for Mason and Terry Arthur.

Document dated 2/14/89-5/20/91. Handwritten notes. Appear to be some type of social service notes regarding visitors and family members.

Document dated 8/27/87 - 8/03/87. Notes regarding furlough revoked.

Document dated 6/11/84 - 10/16/85. Problem in disposition form. Appears to be social service form regarding contact with family and getting a new attorney.

No date. Department of Rehabilitation and Correction Health History form on Maurice Mason.

Document dated 7/21/87. Ohio State Reformatory. Maurice Mason. Questions regarding previous incarceration.

Document dated 4/30/90. Inmate Health Services. Transport of Mason for dermatology.

Document dated 4/23/90. Inmate Health Services. Medical transport of Mason to dermatology clinic.

Document dated 1/09/90. Inmate Health Services. Medical transport of Mason to dermatology clinic.

Document dated 12/21/88. Maurice Mason. Appears to be some type of academic test information.

The following group of documents were received from the Ohio Department of Rehabilitation and Correction. They are prison records on Maurice A. Mason.

Documented dated 4/04/84. Admission center: State of Ohio Department of Rehabilitation and Correction. Admission Center OSR. State of Ohio Department of Rehabilitation and Correction Admission Center document dated 4/04/84.

Admission Center dated 4/09/84. Emergency notification form.

Admission Center dated 4/09/84. Statement of religious preference.

Admission Center CCF 8/24/84. Intake screening evaluation. Contains psychological information and DMS 3 diagnosis indicating immature personality disorder.

Admission Center Employment history date stamped 5/01/84 listing prior employers of Maurice Mason.

Admission Center document dated 6/07/84 OSR.

Admission Center OSR dated 6/20/84. Statement of religious preference. Indicates resident was not present for interview.

Admission Center OSR document dated 6/17/84 indicates religious preference Protestant.

Admission Center CRC document dated 12/05/88.

Document dated 8/07/91 Intake Screening Report - Maurice Mason. Contains inmate version of current offense.

2/14/89 Admission Center LCI Employment History.

2/14/89 Admission Center LCI Employment History.

2/14/89 Admission Center LCI Marital History. Includes common law relationship with a Nicole Cofer, currently a student at BGSU.

2/14/89 Admission Center LCI Criminal Profile and inmates description of the offense.

2/14/89 LCI Employment History.

Admission Center CRC dated 8/07/91.

Intake Screening Report dated 8/07/91.

Documents called Assignment Record dated 4/04/84 - 6/07/91. Appears to be places where Inmate Mason was located within the institution.

5/12/84 -11/05-86 documents identified as Administrative Interviews, Warden Classifications, Committees.

Documents dated 5/02/89 - 1/02/91. Rules infractions Mason committed while in the institution.

Documents identified as family history. Admission Center OSR lists family members and common law wife of Mason. Documents give basically the same information dated 4/25/84, 7/27/87, 2/02/89, 2/14/89.

Security Designation Forms, Department of Rehabilitation and Corrections, State of Ohio. Dates of review are 5/12/84, 6/12,84, 1/22/86, 5/29/86, 1/09/87, 8/07/87, 12/07/88, 8/29/89, 3/13/90, 10/10/90, 9/3/91, 4/29/92. Security level on all documents indicate medium security level for inmate Mason.

The following documents are labeled as Social Service Summaries:

7/12/84. Document contains Mason's version of the burglary offense and the prison in Ohio where he wished to be placed.

No date. Summary deals with the aggravated trafficking offense and circumstances surrounding that case.

The next group of documents are labeled Social Service Contact Form.

These documents are requests for assistance from the inmate. They are dated 12/4/85, 1/28/86, 1/30,86, 5/16/86, 6/2/86, 7/9/86, 9/24/86, 11/20/86, 12/3/86, 12/15/86, 1/22/87, 2/9/87, 2/12/87, 3/2/87, 3/23/87.

The next documents have no dates. They are labeled Visiting List or Record and they appear to be approved visitors of Inmate Mason.

The next group of documents are Inmate Family Notification Forms dated 4/4/84 and 12/6/88. These documents contain persons to be notified in case of emergency.

The following group of documents are labeled Report of Unusual Incident. These documents appear to be prepared when Inmate Mason had an accident that resulted in some physical injury. They are dated 3/10/89, 7/27/89, 9/05/89, 10/9/89, 1/20/90, 4/6/90, 5/8/91, and 9/27/90.

The following group of documents are labeled Inmate Evaluation Report and appear to be evaluations of Inmate Mason while on his job at the institution. They are dated 4/18/89, 6/21/89, 9/18/89, 10/17/89, 12/22/89, 11/29/90, 3/21/91, 2/18/92, and 5/5/92.

The following group of documents is addressed to Social Service and is regarding visits from persons to Inmate Mason. Dates are 11/5/85 involving a Ginger Renee Howard; 2/27/86 involving Brenda Serber; 9/18/86 Ginger Howard is requested by Mason to be removed from his visiting list; 11/29/86 Karina Spiller; 3/12/89 visitor application form for Nicole Cofer; notification that Nicole Cofer did not

show up for scheduled visit 2/24/91 and 3/10/91; visitor application for Nancy Lynn Fortner dated 5/11/91; letter to Nancy Fortner dated 5/8/91 regarding visiting Inmate Mason; 5/20/91 adding Nancy Fortner's name to visiting list; 8/8/91 temporary visiting list.

Documents from Psychological Services. Appear to be contacts with Inmate Mason dated 4/4/84, 4/24/84, 6/12/84, 10/18/84, 12/5/88, 2/7/89, 3/18/89, 6/7/91.

Documents labeled Classification and Reclassification Minutes. These are documents which record Inmate Mason's work assignments within the institution and changes to those work assignments. Dates: 3/26/85, 8/12/85, 1/17/86, 1/22/86, 1/9/87, 6/29/89, 10/5/89, 10/12/89, 10/26/89, 12/21/89, 5/31/90, 8/23/90, 1/7/91, 3/28/91, 4/11/91.

The following documents are labeled Problem and Disposition. They are dated 6/11/84 - 5/20/91. They appear to be contacts with Social Services in regards to difficulties that Inmate Mason was having while in the institution.

The following documents are labeled Parole Board Risk Assessment/Aggregate Score. These appear to be scoring grids and are dated 1/6/89, 2/13/90, 2/11/91, 5/16/91, 5/19/91.

The following documents are Pre-Parole Planning Forms for Inmate Mason. No date on the first document. Parole Plan Supplement no date. 1/15/91 Pre-Parole Planning and Parole Plan Supplement. 1/16/91 Pre-Parole Planning and

Supplement. 5/6/92 Pre-Parole Planning. Parole Placements including Plan A and Plan B.

The following documents were completed in connection with psychological assessment. The first is dated 4/12/84. This is incomplete sentences. 4/16/84 is a testing grid. Numerous testing grids without dates and forms to complete incomplete sentences dated 12/7/88 and 8/9/91. Testing grid on the Minnesota Multiphasic Personality Inventory.

Group of documents that appear to be to the Social Service Departments at the institutions indicate Kite procedure and they are a group of handwritten notes from Inmate Mason and responses from the Social Services Departments. They appear to include requests from Social Services for a variety of assistance including requests for medical treatment.

Group of documents labeled Individual Segregation Record Sheets dated 5/18/90 and 11/17/90. Appear to be completed when Inmate Mason was segregated from the rest of the population at LCI.

Documents that show minutes of parole meetings from 1/12/87 - 5/19/92. Actions involving Inmate Mason are included on each page including furlough approved and revoked and probation approved and revoked.

Inmate Mason's contact with Terry Arthur Mason. The first one is dated 10/15/91 and is a package receipt. Memo dated 11/6/91 to Steven Dorsey, Deputy Warden, from George Alexander, Warden, regarding Maurice Mason marriage

ceremony arrangements and gate pass. 10/1/91 letter to Terry Arthur from George Alexander, Warden, regarding procedure to be married in the institution. 10/21/91 memo to the Visiting Officer from George Alexander, Warden, regarding obtaining the marriage license. 11/9/91 General Visiting Policies and Instructions signed by Ruby Mason. Document dated 2/25/92 General Visiting Policies and Instructions signed by Mioshi Mason. 5/25/92 package receipt from Terry Mason. 9/26/92 letter to Mr. Capotes from Terry Mason regarding parole for Maurice Mason. 4/20/92 to George Alexander, Warden, from J.R. Stanforth regarding inappropriate behavior by Terry Mason and Inmate Mason in the visiting room. Handwritten letter to Mr. Capotes dated 5/2/92 from Mrs. Terry Mason regarding Maurice Mason's upcoming parole hearing. Document not labeled appears to be a list of rules violations dated 1985 through 1987.

Documents labeled Lock Report Adjustment Ratings. 4/23/91 evaluation of Mr. Mason's behavior while in the institution.

Documents containing mug shots and identifying information.

The following documents pertain to furlough:

Document dated 11/5/86 to the Chairman of the Parole Board from the Review Committee, OSR, regarding Maurice Mason and furlough eligibility hearing. Recommended a Parole Board hearing to be scheduled.

Document dated 12/18/86. Maurice Mason regarding previous criminal case, burglary, Marion County Case No. 84-CR-20.

Memo to Judge of Marion County Common Pleas Court and Marion County Prosecuting Attorney dated 12/4/86 regarding hearing on Maurice Mason.

1/5/87 Parole Candidate Evaluation Maurice Mason.

3/27/87 letter to Marion County Department of Human Services regarding any support due from Maurice Mason as an absent parent.

3/27/87 letter to Marion County Clerk of Courts regarding Maurice Mason regarding any financial obligations due in connection with the criminal case 84-CR-20.

3/27/87 letter to the Adult Probation Department, Marion County Courthouse, regarding Maurice Mason and any financial obligations due in connection with prior criminal case 84-CR-20.

4/6/87 waiver of Extradition/Furlough for Maurice Mason.

4/6/87 Authorization to Release Confidential Information signed by Maurice Mason.

4/6/87 Adult Parole Authority Certificate of Furlough for Maurice Mason.

4/6/87 Special Minutes F.B.I.C. regarding furlough of Maurice Mason.

4/9/87 letter to Ohio Department of Rehabilitation and Corrections from Marion County

Child Support Enforcement Unit indicating no financial obligation due in that office by Maurice Mason.

4/20/87 memo to Judge, Marion County Common Pleas Court, and Prosecuting Attorney from the Ohio Adult Parole Authority notifying of release hearing for Maurice Mason.

4/22/87 Adult Parole Authority First Visit Report on Maurice Mason completed by Rebecca Thomas, State Furlough Officer.

6/16/87 Case Review Summary regarding testing positive for marihuana.

6/8/87 letter to Mr. Capotes from James Mason regarding employment for son Maurice Mason.

6/18/87 notification of violation of furlough rules.

6/19/87 Waiver of Release Violation Preliminary Hearing, Adult Parole Authority, signed by Rebecca Thomas and Maurice Mason.

6/26/87 Alleged Furlough Violation and Supervision Summary Report signed by Rebecca Morris and John H. Walker.

6/30/87 arrest report of Maurice Mason regarding furlough violation.

7/8/87 letter to John Walker from Jerry Hillerson, Furlough Program, authorizing the return of Maurice Mason to Ohio State Reformatory.

7/13/87 memo to Eric Dahlberg, Superintendent, Ohio State Reformatory, from Roger

Overberg regarding Maurice Mason parole violator. Authorization to receive Maurice to the institution.

7/24/87 request for counsel at furlough revocation hearing of Maurice Mason.

Memo to Eric Dahlberg, Ohio State Reformatory, from Raymond Capotes regarding the request of Maurice Mason for informal furlough revocation hearing.

7/28/87 letter to Maurice Mason from Raymond Capotes regarding date and time of the informal furlough revocation hearing.

7/24/87 Alleged Furlough Supplement and Close of Interest by Rebecca M. Thomas, State Furlough Officer.

8/29/87 Security Designation Form of Ohio Department of Rehabilitation and Corrections.

8/28/87 Office of Record Clerk. Maurice Mason released from Comp Drug Halfway House.

9/1/87 restore to furlough.

9/3/87 appear to be handwritten notes but they are not legible.

9/1/87 Maurice Mason Certificate of Furlough.

9/24/87 furlough to parole.

9/29/97 to Jerry Hillerson, Coordinator Furlough Program, from R.E. Smith, Chief Hearing Officer, regarding hearing waived on furlough candidates including Maurice Mason.

10/20/87 list of furlough hearing waived cases including Maurice Mason.

10/26/87 Certificate of Parole/Release Authorization for Maurice Mason.

9/2/87 Close of Interest, Adult Parole Authority. Mason terminated for furlough and transferred to parole. Doug Schiefer is Parole Officer.

11/13/87 Office of the Record Clerk, Ohio Spate Reformatory. Mason released on parole from furlough effective 11/2/87.

8/3/87 Parole Board Parole Candidate Evaluation.

10/26/87 Certificate of Parole/Release Authorization.

11/87 Parole Plan for Maurice Mason.

11/2/87 Close of Interest completed by Rebecca Thomas, Furlough Officer.

11/17/87 Adult Parole Authority Statement of Parole Agreement for Maurice Mason.

9/88 Indictment from Marion County Common Pleas Court for Maurice Allen Mason, two counts aggravated trafficking.

Case No. 88-CR-267, State of Ohio v. Maurice Mason, Marion County Common Pleas Court, Journal Entry of Judgment on aggravated trafficking charge.

10/14/88 Adult Parole Authority Order to Hold Maurice Mason.

10/18/88 Adult Parole Authority Notification of On-sight Hearing for Maurice Mason.

10188 Waiver of Release Violation Preliminary Hearing for Maurice Mason.

10/20/88 Arrest report for Maurice Mason. Violation of drug law.

11/8/88 handwritten interoffice communication from Bill Hanz regarding William Simpson and Maurice Mason.

11/8/88 Alleged Parole Violation and Supervision Summary completed by Doug Schiefer regarding Maurice Mason.

12/1/88 Parole Violation Supplement completed by Doug Schiefer.

Memo to Judge, Common Pleas Court, and Prosecuting Attorney, Marion County, Ohio from Adult Parole Authority dated 1/29/90 regarding a release clemency hearing on Maurice Mason.

Handwritten notes on computation of time served by Maurice Mason.

2/13/90 Ohio Parole Board Parole Candidate Evaluation.

2/13/90 Parole Board Risk Assessment/ Aggregate Score.

2/21/90 letter to Adult Parole Authority from Brent Harraman, Assistant Prosecuting Attorney, regarding Maurice Mason indicating that release at this time would be inappropriate.

5/16/91 handwritten notes Parole Board regarding parole hearing Maurice Mason.

5/16/91 Conditions of Supervision, Adult Parole Authority.

6/20/91 Conditions of Supervision Maurice Mason, Adult Parole Authority.

5/30/91 transferring Maurice Mason from Lima Correctional to Pickaway Pre-Release Center.

6/11/91 memo regarding death of Richard Craig Mason.

6/11/91 minutes of special meeting of the Adult Parole Authority granting Maurice Mason parole.

6/12/91 Certificate of Parole/Release Authorization.

8/23/91 Guide to Special Conditions of Supervision for Maurice Mason indicating conditions of parole.

7/7/91 Adult Parole Authority to hold.

Adult Parole Authority Notification of Probable Cause Finding and Release of Revocation Hearing.

Document undated. Handwritten notes.

7/11/91 Arrest Report Maurice Mason.

7/12/91 Alleged Parole Violations Supervision Summary on Maurice Mason completed by Bill D. Cutler.

7/7/91 Official Complaint Report Marion County Sheriff's Department.

7/17/91 Case Review Summary regarding Mason parole violations.

7/10/91 Adult Parole Authority Notification of On-sight Hearing.

7/20/91 Adult Parole Authority Initial Client Assessment.

5/16/91 Ohio Parole Board Parole Candidate Evaluation.

7/16/91 Adult Parole Authority Notification of Probable Cause Finding and Release Revocation Hearing.

7/22/91 Arrest report Maurice Mason.

7/20/91 letter from Terry Lukuch, Attorney Hearing Officer. regarding on-sight parole revocation hearing. Hearing Officer found probable cause on violations.

8/23/91 three pages of handwritten notes. Appears to be regarding the parole revocation hearing.

8/29/91 Adult Parole Authority Request for Waiver of Final Parole Revocation Hearing.

7/16/91 Placement Investigation Request Mason, Adult Parole Authority.

7/16/91 State of Ohio Waiver of Extradition Parole, Maurice Mason.

7/30/91 Special Minutes, Adult Parole Authority.

7/30/91 letter to Lee Sampson from Terry Lukuch regarding return of Mason to CRC.

Memo to Warden at CRC regarding Mason being a parole violator.

8/7/91 Adult Parole Authority close of file submitted by Bill D. Cutler, State Parole/Probation Officer.

8/29/91 Adult Parole Authority Request for counsel at Parole Revocation Hearing.

9/6/91 letter or memo from Beth Bentz of the Ohio Public Defender's Office regarding Maurice Mason. Letter contains information regarding problems with prosecutor's case in connection with a conversation that Beth had with Sara Babich, Mason's attorney.

9/11/91 letter to Maurice Mason from Thomas Schneider, Chief Hearing Officer, Ohio Parole Board, indicating violations of parole and that parole be revoked and continued until 7/92.

9/12/91 Ohio Parole Board Release Consideration form.

10/8/91 Acknowledgement form in connection with upcoming parole revocation hearing.

10/8/91 Mason waiving right to revocation hearing within 60 days.

5/19/92 State of Ohio Waiver of Extradition Parole, Maurice Mason.

5/19/92 Authorization to Release Information and Stay Release, Maurice Mason.

5/19/92 Treatment Program Summary.

5/19/92 Conditions of Supervision.

6/9/92 Case Assignment Form, Ohio Adult Parole Authority.

7/6/92 Certificate of Parole/Release Authorization.

B.C.I. Form indicating parole 7/20/92.

7/20/92 Placement Investigation Request to Adult Parole Authority regarding Maurice Mason.

7/20/92 Adult Parole Authority Conditions of Supervision.

7/23/92 Ohio Adult Parole Authority Initial Client Assessment.

Four documents Parole Board hearings and actions containing dates of each action and hearing of the Parole Board from 11/87 – 7/20/92.

Memos dated 6/6/84 - 9/20/91 transferring inmates from the institution for medical treatment including Maurice Mason. Date: 6/6/84 - 9/20/91.

Documents containing laboratory reports and physicians' notes dated 4/5/84 - 6/91.

Document identified as Substance Abuse Program Screening Instrument dated 12/5/88 for Maurice Mason.

Documents dated 1/11/85 - 3/19/87 regarding reports of unusual incidents. Documents contain incidents for which Mason was injured and the action taken by the institution to treat the injury.

Dental records dated 6/7/84 - 2/13/92.

Reports from Radiology Department regarding Maurice Mason dated 1/14/85 - 6/4/90.

State of Ohio Department of Rehabilitation and Correction Admission Center. Medical history,

physical history, immunization records, and health history dated 4/5/84 - 8/7/91.

Documents dated 4/17/84 regarding a request from Inspector Edwin Whipple and Detective Richard Thompson, Marion City Police Department, to come to the institution and interview Mason. Also, an Inmate Consent Form to be interviewed signed by Mason dated 4/17/84.

Lima Correctional Institution Supervision Review Committee Reports. Documents review level of security for inmate and also his rules infractions while at the institution. Documents are dated 8/29/86 - 11/17/90.

In addition to the documents we have provide you, we have a sealed envelope from the Department of Rehabilitation & Correction which they provided in response to our subpoena duces tecum. The envelope is marked "Confidential" and they have written on the envelope, "Documents considered Confidential by Department. Should be viewed by Judge." We have honored this confidentiality and have not opened this envelope. My suggestion would be that during either our January 21 or January 28 hearing with the Court, that the envelope be opened by the Court with copies provided to the Prosecutor and Defense Counsel.

Sincerely,
s/Jim Slagle
Prosecuting Attorney

s011294.m06

Enclosures

cc: (without enclosures)
Judge William Wiedemann
Lawrence Winkfield

No. 09-74

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2008

KEITH SMITH, WARDEN

Petitioner,

v.

MAURICE MASON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CAPITAL CASE

QUESTION PRESENTED

Is review by this Court appropriate where: (1) the Warden does not dispute that the Sixth Circuit properly stated the rule of law regarding an ineffective assistance of counsel claim; (2) the Warden contests only the court's straightforward application of this rule to the facts; and (3) the court merely concluded that trial counsel failed "to undertake a reasonable investigation to support [his] strategic decisions about the presentation of mitigation evidence" and therefore did not give deference to counsel's last-minute decision to not further investigate his client's background?

LIST OF PARTIES

The petition accurately lists the parties to the proceeding

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A. After a jury convicted and sentenced Mason to death in state court, he unsuccessfully pursued direct appeals. 5

B. Mason unsuccessfully pursued post-conviction relief in state and federal district court. 6

C. On appeal, the Sixth Circuit noted troubling indications that counsel had failed to properly investigate mitigating evidence and therefore remanded Mason's case for the district court to develop evidence to evaluate his penalty-phase ineffective assistance of counsel claim. 7

D. Reviewing the evidence generated at the evidentiary hearing in a second appeal, the Sixth Circuit held that "trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the obvious red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age." 7

1 The Sixth Circuit held counsel's "woefully inadequate" investigative efforts rendered his performance deficient and objectively unreasonable 8

2. The Sixth Circuit held counsel's deficient performance prejudiced Mason because a reasonable probability existed that, had the jurors (who had initially deadlocked) heard the substantial evidence detailing the abusive and unhealthy conditions of Mason's childhood, they might have returned a different penalty-phase decision. 9

3. The Sixth Circuit held that the Ohio Supreme Court unreasonably applied clearly established law because it ignored the principle established in *Strickland* that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 12

REASONS FOR DENYING THE WRIT 14

A. The Warden seeks review in this Court merely to change the result in this case. 15

1. The Sixth Circuit's application of this Court's ineffective assistance of counsel precedents was routine and proper. This Court has already rejected objections similar to those of the Warden and the dissent below in its previous ineffective assistance of counsel habeas cases. 15

2. The Warden's claimed impact of the Sixth Circuit's opinion is based on an inaccurate characterization of the court's decision and an improper approach to the ineffective assistance of counsel analysis. 17

B. *Spisak's* issues are distinct from those involved in Mason's case and do not justify holding this petition pending a decision in that case. 22

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Maurice Mason, respectfully requests that this Court deny the Warden's petition for a writ of certiorari, and also asks the Court to deny the Warden's alternative request to hold this petition pending this Court's decision in *Smith v. Spisak*, No. 08-724 (cert. granted Feb. 23, 2009), which the Warden acknowledges presents issues distinct from those presented here, *see* Brief of Petitioner at 42, 44, *Smith v. Spisak*, No. 08-724 (filed May 22, 2009).

OPINIONS BELOW

The petition accurately lists the opinions below.

JURISDICTIONAL STATEMENT

The Respondent concurs in the statement of jurisdiction in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive a person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

On the eve of the penalty phase of his client's capital murder trial, trial counsel made what the Warden characterizes as "strategic" decisions to forgo further investigation and to forgo a mitigation presentation concerning his client's bizarre childhood. At that point, however, having conducting virtually no investigation into potential mitigating evidence and with just five days remaining before the beginning of the penalty phase, counsel's decision hardly represented a considered tactical choice among competing alternatives. In light of his deficient investigation, it was in fact counsel's only option.

Although he had been appointed to represent Mason and had assumed the role of mitigation counsel on the case nearly nine months earlier, in October of 1993, counsel's records reflect that the bulk of his work for the first six months consisted of preparations for the trial phase and unsuccessful attempts to obtain mitigation assistance from the Ohio Public Defender's Office and to obtain funding from the trial court for an independent mitigation specialist. In May and early June of 1994, counsel obtained funding for a brief psychiatric examination regarding his client's potential for rehabilitation and/or his potential for future dangerousness. This examination, however, did not focus on any of the detrimental aspects of Mason's childhood or their effect on his behavior. Finally, on June 22, 1994, with less than a week remaining before the penalty phase of his client's trial was to begin, counsel turned his attention to the merits of a mitigation presentation concerning his client's background.

Having failed by then to engage in anything more than a rudimentary inquiry into his client's

background, counsel was out of time and out of options. Counsel had not conducted a single in-depth interview with any of his client's relatives — not his client's mother, his client's father, nor any of his client's several brothers and sisters — even though the few records counsel *had* reviewed revealed that his client had been born into a drug-dependent family; that his client's parents had both been incarcerated for dealing drugs; that a psychological evaluation of his client as a teenager documented his exposure to significant violence; and that a police report created when his client was 13 years old noted visible injuries (including multiple cuts, scars, and swelling on his face, arms, and back) that were the result of beatings by his father. In nearly nine months of representation, however, counsel had not investigated any of these areas of concern. With the penalty phase looming, counsel's decision to forgo further investigating and presenting family background mitigation was not based on a reasonable investigation and was not therefore a "strategic" decision owed any deference. As a result of his procrastination and inattention, and with just five days left to prepare for the penalty phase, giving up for good on tracking down these leads was counsel's only remaining option.

The Warden argues that counsel was faced with the risk that the trial judge would permit the prosecutor to introduce undesirable evidence concerning his client's criminal past, relying on a state law that allowed the prosecutor to rebut false or incomplete testimony about a defendant's *criminal record*. While the analysis supporting the admissibility of such rebuttal evidence in response to testimony concerning purely the defendant's troubled *childhood* is dubious, it is beside the point. The Sixth Circuit properly concluded that counsel was in no position to make an informed assessment about the comparative benefits of introducing mitigating evidence about his client's miserable home life. Even if the risk the trial court would admit the potentially damaging

information about his client's criminal activity was realized, without having sufficiently investigated the mitigating evidence, counsel could not have weighed the harmful evidence he knew against the helpful evidence he had failed to investigate. As this Court has observed in a related context, this record "underscores the unreasonableness of counsel's conduct by suggesting that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

The Sixth Circuit's decision represents a straightforward application of this Court's well-established precedent concerning an ineffective assistance of counsel claim. Specifically, as this Court did in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins*, 539 U.S. at 510, and *Rompilla v. Beard*, 545 U.S. 374 (2005), the Sixth Circuit determined that counsel failed "to undertake a reasonable investigation to support [his] strategic decisions about the presentation of mitigation evidence," App. 34a, and accordingly, granted Mason relief for his counsel's deficient performance. The Sixth Circuit judged counsel's performance under a standard fully consistent with, and no more demanding than, the one this Court articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and repeatedly applied in *Williams*, *Wiggins*, and *Rompillia*.

Although the Sixth Circuit's decision is legally sound, even if it were not, this Court should not accept review merely to correct errors in the application of the proper rule of law to the facts of a particular case. The Sixth Circuit broke no new ground in its decision, and the Warden has not suggested that its statement of the applicable law conflicts with that of any other court. The Warden's objections all flow from a disagreement with the Sixth Circuit's fact-specific determination that Mason's counsel had not conducted sufficient investigation upon which to premise his decision to terminate further inquiry into his client's background. The Sixth Circuit's

analysis of the facts of this case under the *Strickland* standard thus impacts Mason's case, but few, if any, others. Likewise, as the Warden's other briefing before this Court makes clear, the issues at stake in *Smith v. Spisak*, another Sixth Circuit capital case set for argument this term, are not sufficiently related to those in Mason's case to justify holding this petition. For these reasons, Respondent respectfully requests that this Court deny the petition.

STATEMENT OF THE CASE

A. After a jury convicted and sentenced Mason to death in state court, he unsuccessfully pursued direct appeals.

A jury found Maurice Mason guilty on June 18, 1994, of three counts, each with a firearm specification: (1) aggravated murder, with a death penalty specification that the murder occurred during the commission of a rape; (2) rape, with a prior aggravated felony specification; and (3) having a weapon while under disability, with an offense of violence specification. App. 10–11a.

Mason's penalty phase began on June 27, 1994. App. 11a. After considerable deliberation, the jury indicated it was "unable to reach a unanimous decision on any one of the sentencing options." App. 12a (internal quotation marks omitted). The Court inquired whether the foreman thought they could reach a verdict if they were given additional time. *Id.* The foreman responded, "No." *Id.* (internal quotation marks omitted). Despite this unequivocal response, the trial court sent the jury back to the jury room to deliberate further. *Id.* The next day the jury returned a death verdict. *Id.* The trial court accepted the verdict and sentenced Mason to death for aggravated murder. *Id.*

Mason filed a timely appeal in which he raised twenty-four issues. *Id.* The Ohio Court of Appeals for the Third Appellate District affirmed his conviction and sentence. App. 12a–13a.

Mason then appealed to the Ohio Supreme Court, which also affirmed Mason's conviction and death sentence. App. 13a. This Court denied Mason's petition for a writ of certiorari on December 14, 1998. *Id.*

B. Mason unsuccessfully pursued post-conviction relief in state and federal district court.

While he was litigating his direct appeals, Mason filed a collateral attack in the state trial court, asserting seven assignments of error. *Id.* On November 21, 1996, the court denied relief without holding an evidentiary hearing. *Id.* Mason appealed the dismissal of his post-conviction petition, and the state appellate court affirmed the judgment of the trial court on June 6, 1997. *Id.* Mason then filed a timely appeal to the Ohio Supreme Court, which dismissed the appeal on October 15, 1997, as not involving any substantial constitutional question. App. 303a–304a.

On July 15, 1999, Mason filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising twenty-five challenges to his conviction and sentence. App. 13a–14a. On May 9, 2000, the district court denied Mason's habeas petition and his motion for an evidentiary hearing on various claims. App. 188a. The district court subsequently granted a certificate of appealability as to all claims, and Mason timely appealed. App. 14a.

C. On appeal, the Sixth Circuit noted troubling indications that counsel had failed to properly investigate mitigating evidence and therefore remanded Mason's case for the district court to develop evidence to evaluate his penalty-phase ineffective assistance of counsel claim.

The Sixth Circuit affirmed the district court's ruling in part, but remanded the case to the district court for an evidentiary hearing on Mason's claim that he had been denied the effective assistance of counsel at the penalty phase of his capital trial. App. 106a–107a. Finding "inexplicable the apparent failure of trial counsel to investigate mitigating evidence in this case,"

App. 134a n.13, the Court noted that the facts before it indicated "a significant likelihood that defense counsel acted unreasonably in failing to conduct an independent and thorough investigation of Mason's background." App. 128a. Because the record was inadequate to allow the court to meaningfully review that claim, it remanded the case to the district court for an evidentiary hearing on this issue. App. 136a.

After a lengthy evidentiary hearing and post-hearing briefing, the district court again denied Mason's claim. App. 60a–61a. He timely appealed.

D. Reviewing the evidence generated at the evidentiary hearing in a second appeal, the Sixth Circuit held that "trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the obvious red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age."

In Mason's second appeal following the district court's decision on remand, the Sixth Circuit considered Mason's claim in light of the evidence introduced at the evidentiary hearing. Proceeding under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), the Sixth Circuit identified the clearly established law governing Mason's ineffective assistance claim, noting that, "as in *Strickland*, *Williams*, *Wiggins*, and *Rompilla*, Mason's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence to be presented at the sentencing phase of a capital trial." App. 17a (internal quotation marks and citation omitted). The court held that counsel's performance was deficient and objectively unreasonable, that Mason was prejudiced as a result, and that the Ohio Supreme Court unreasonably applied clearly established federal law in rejecting Mason's ineffective assistance of counsel claim. App. 19a.

1. The Sixth Circuit held counsel's "woefully inadequate" investigative efforts

rendered his performance deficient and objectively unreasonable.

First, applying the clearly established law "regarding what constitutes a reasonable investigation of mitigating evidence at the sentencing stage —and of the circumstances that trigger counsel's obligation to investigate further—," the court held that counsel's performance "was deficient and objectively unreasonable." App. 19a-20a. Testimony at the evidentiary hearing established that counsel did not select his strategy for the penalty phase of trial until June 22, 1994, just days prior to the mitigation hearing. App. 20a. The court therefore focused its evaluation of counsel's performance "on what knowledge [he] then possessed regarding Mason's childhood and background and what investigation and interviews, if any, that [he] had performed prior to making that decision." App. 20a–21a (citing *Wiggins*, 539 U.S. at 527 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.")). The court concluded that the evidentiary hearing demonstrated that counsel had "relied almost exclusively on the records provided by the state and inexplicably failed to conduct his own independent investigation and interview members of Mason's family regarding the circumstances of his childhood and background." App. 25a. *See also* App. 25a–31a (citing testimony and records demonstrating that counsel "*never* conducted any indepth interviews with *any* of Mason's relatives" and that counsel's few brief contacts with certain members of Mason's family all occurred after June 22, the day counsel decided to forgo further investigation and any mitigation presentation about Mason's background or childhood).

In light of this Court's precedents, particularly those enforcing the minimum standards for reasonable mitigation investigations, *see* App. 21a–24a (citing and quoting *Wiggins*, 539 U.S. at

524–28; *Rompilla*, 545 U.S. at 381–90), the court held that counsel's performance was deficient, App. 34a. It noted that "although state records contained information suggesting that Mason's childhood was marked by violence and pervasive drug use," the evidence demonstrated that counsel's "investigative efforts to learn any further details about Mason's background were woefully inadequate." App. 33a–34a. These "efforts consisted of no more than reviewing documents provided by the state, arranging for a psychiatric evaluation limited to predicting Mason's future dangerousness, talking to Mason himself, and very briefly talking to a small subset of Mason's family members." App. 34a.

2. **The Sixth Circuit held counsel's deficient performance prejudiced Mason because a reasonable probability existed that, had the jurors (who had initially deadlocked) heard the substantial evidence detailing the abusive and unhealthy conditions of Mason's childhood, they might have returned a different penalty-phase decision.**

Next, again applying clearly established law, the court held that counsel's deficient performance prejudiced Mason. *Id.* Had counsel not abandoned his investigation, the court reasoned, he could have discovered "substantial evidence detailing the abusive and unhealthy conditions of [Mason's] childhood." *Id.* The evidentiary hearing demonstrated that, for three years, Mason's father ran a prostitution ring, and Mason's mother shot his father because of his involvement with prostitution. *Id.* Mason's father also operated a home-based drug business that employed ten drug sellers. *Id.* Both of Mason's parents used drugs daily and also trafficked drugs. App. 34a–35a. Mason had experimented with drugs when he was eight years old, and Mason's father took him along on trips to purchase and sell drugs while Mason was in the sixth and seventh grades. App. 35a. Mason's parents regularly abused Mason and isolated him from anyone not associated with their drug-dealing activities. *Id.* Largely as a result of this dysfunctional home

environment, Mason developed a borderline personality disorder. *Id.*

Evaluating this evidence, the court concluded that Mason "'has the kind of troubled history'" that this Court has "'declared relevant to assessing a defendant's moral culpability,'" and therefore held that "'had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" *Id.* (quoting *Wiggins*, 539 U.S. at 534, 536). Because Mason could "demonstrate prejudice by establishing that 'there is a reasonable possibility that at least one juror would have struck a different balance,'" App. 18a (quoting *Wiggins*, 539 U.S. at 537), and because "Mason's jury initially reported a deadlock regarding his sentence," the court reasoned that "[e]ven a slightly more compelling case for mitigation . . . might have altered the outcome of the sentencing phase of Mason's trial," App. 34a.

The court reasoned that Mason's showing of prejudice was not diminished by any perceived risk that the prosecutor would have introduced unfavorable evidence about Mason's criminal record if counsel had offered mitigating evidence regarding Mason's childhood. It explained that "testimony that purely concerned Mason's troubled childhood would not give the prosecutor the same opportunity for rebuttal that evidence about good character or rehabilitation potential could have." App. 36a (internal quotation marks omitted); *see also id.* (explaining that "the Ohio Supreme Court held that if 'a mitigation witness called by the defense *falsely or incompletely testifies on the extent of the defendant's criminal record*, the prosecutor should be permitted to rebut,'" but "emphasized that '[t]his right is limited, however, to those instances where the defense offers a *specific assertion*, by a mitigation witness or by the defendant, *that misrepresents the defendant's prior criminal history*'") (quoting *State v. DePew*, 528 N.E.2d 542, 555 (Ohio 1988)). It also noted that the trial court never opined that it would admit the rebuttal evidence if "counsel presented only

evidence detailing Mason's troubled childhood, most likely because Mason's counsel never investigated Mason's childhood nor planned to present such evidence." App. 38a. *See also* App. 39a–42a (discussing pre-trial proceedings and evidentiary hearing testimony that demonstrated that "the admissibility of the prosecutor's rebuttal evidence hinged on whether the defense would make use of [the psychiatric doctor's] deposition testimony that misstated Mason's *criminal* history," and noting that "[w]hether the trial court would have admitted the prosecutor's rebuttal evidence in response to a defense strategy based solely on the circumstances of Mason's troubled childhood remains a hypothetical question because [counsel] never planned to present such a defense"). For these reasons, the court found that the district court's conclusion that Mason had not demonstrated prejudice was based on a flawed understanding of the possibility that the prosecutor could have introduced rebuttal evidence about Mason's criminal history. App. 35a–36a.

3. **The Sixth Circuit held that the Ohio Supreme Court unreasonably applied clearly established law because it ignored the principle established in *Strickland* that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."**

Finally, the Sixth Circuit determined that Mason was entitled to habeas relief under AEDPA because "the Ohio Supreme Court unreasonably applied clearly established federal law in denying his claim." App. 42a (citing 28 U.S.C. § 2254(d))

First, the court explained that "[t]he Ohio Supreme Court unreasonably applied the *Strickland* standard in rejecting Mason's claim because the Ohio Supreme Court ignored the principle established in *Strickland* that 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" App. 44a (quoting *Strickland*, 466 U.S. at 690–91 and citing *Williams*, 529 U.S. at

396 (finding deficient performance because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background")). While the state court had noted some of counsel's investigative activities, the Sixth Circuit reasoned that the state court had "failed to consider whether Mason's counsel conducted any interviews with Mason's family members or performed any investigation beyond examining the documents that the state provided to them and talking to Mason." App. 44a–45a. Without considering this gap in counsel's performance, the court explained, the state court "simply asserted that Mason's counsel had made a strategic decision regarding mitigation strategy." App. 45a. Thus, the court held that the state court's failure "to assess whether a thorough and reasonable investigation supported counsel's strategic decision . . . constitute[d] an unreasonable application of *Strickland*." *Id.* (citing *Wiggins*, 539 U.S. at 527 (observing that "the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background—the information in the [state] records—they were in a position to make a tactical choice not to present a mitigation defense," and characterizing the state court's application of *Strickland* as "objectively unreasonable" because "the [state] court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the [state] records actually demonstrated reasonable professional judgment")).

In addition, the Sixth Circuit held that the analysis supporting the Ohio Supreme Court's decision that Mason had failed to show prejudice was also flawed and objectively unreasonable. *Id.* The Sixth Circuit reasoned that the Ohio Supreme Court had misunderstood Mason's argument when it considered the risk that the prosecutor could have introduced evidence about Mason's criminal past. The Ohio court had analyzed whether presenting evidence "'as to his good character and rehabilitation potential' would risk rebuttal evidence." App. 46a (quoting App. 341a). As the Sixth

Circuit explained, however, that was not the proper consideration. *Id.* Mason's argument was that "his counsel should have presented a mitigation case focusing on his childhood, dysfunctional family, and his emotional psychological problems, *not* his good character or rehabilitation potential." *Id.* Because introducing this background evidence would certainly not entail the same risk as introducing character and rehabilitation evidence based on inaccurate characterizations of Mason's criminal history, the Sixth Circuit concluded that the Ohio Supreme Court was objectively unreasonable in holding "that Mason failed to show prejudice by invoking the spectre of rebuttal evidence responding to a mitigation strategy that Mason was not advocating." *Id.*

For all of these reasons, the Sixth Circuit granted Mason a conditional writ of habeas corpus. *Id.* The Sixth Circuit denied the Warden's request for rehearing or rehearing en banc. App. 3a–4a.

REASONS FOR DENYING THE WRIT

This Court should deny the Warden's petition for several reasons. First, the Sixth Circuit's decision does not present an issue worthy of this Court's consideration. The legal standard identified by the lower court does not conflict with that of any other circuit; indeed, the opinion represents a routine application of this Court's well-established precedents. In fact, the dissent's and the Warden's complaints mirror those this Court has previously rejected in similar cases.

Second, the Warden's assertion that the decision has set an unreasonably high standard for trial counsel's mitigation performance is misplaced. Far from imposing on trial counsel the dilemma that the Warden fears, the decision simply requires, as this Court has required numerous times before, that counsel conduct an investigation sufficient to support a reasonable strategic decision before it grants unreviewable status to such a decision.

Finally, the issues presented by this case are distinct from those involved in another Sixth

Circuit case presently pending before this Court, *Smith v. Spisak*, No. 08-724 (cert. granted Feb. 23, 2009). The Warden has acknowledged as much, *see* Brief of Petitioner at 42, 44, *Smith v. Spisak*, No. 08-724 (filed May 22, 2009). Consequently, no reason exists to hold this case pending the decision in *Spisak*.

A. The Warden seeks review in this Court merely to change the result in this case.

The Warden does not attempt to manufacture a circuit split here, for good reason: none exists. The Sixth Circuit did not forge new ground in applying this Court's well-established ineffective assistance of counsel standards to Mason's claim.

Although "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," S. Ct. R. 10, the Warden requests review in this Court merely for this reason. The Warden does not dispute that the Sixth Circuit properly stated the rule of law regarding ineffective assistance of counsel and this Court's amplification of it in *Strickland*, *Williams*, *Wiggins*, and *Rompilla*. The Warden contests only the application of those rules to the facts of Mason's case. Specifically, the Warden's arguments all flow from its objection to the court's conclusion that Mason's counsel had sufficient information to support his decision to abandon further investigation into his client's background. *See* Pet. at 15-20.

While the Sixth Circuit's resolution of the case based on these facts and law was correct, even if it were not, granting the petition here would have little, if any, impact beyond the litigants in this case. Denial is therefore proper.

1. The Sixth Circuit's application of this Court's ineffective assistance of counsel precedents was routine and proper. This Court has already rejected objections similar to those of the Warden and the dissent below in its previous ineffective assistance of counsel habeas cases.

The Sixth Circuit's finding that Mason was denied the effective assistance of counsel, where counsel had failed to turn his attention to a crucial category of potential mitigating evidence until just five days before the penalty phase of trial was to begin (and at that point, decided to simply abandon ever thoroughly investigating this evidence), was hardly novel. Indeed, this Court noted that the State "barely disputed" in its brief in *Williams* that counsel's representation during the sentencing phase in that case fell short of professional standards where they "did not begin to prepare for that phase of the proceeding until a week before the trial." *Williams*, 529 U.S. at 395.

Likewise, this Court acknowledged in *Wiggins* that *Strickland's* long-established standards impose a duty on counsel to adequately investigate mitigation evidence. This rule means that performance is deficient where counsel consults only a few limited sources for information about his client's background. In *Wiggins*, this Court found counsel disregarded well-defined professional norms and "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. The *Wiggins* Court also explained that even though "counsel had some information with respect to petitioner's background," they were not "in a position to make a tactical choice not to present a mitigation defense" because, "[i]n assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527.

In response to the objection that Wiggins' counsel had "limited the scope of their investigation for strategic reasons," this Court noted that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy," and emphasized that "a reviewing court must consider the reasonableness of the investigation said to

support that strategy." *Id.* Moreoever, this Court explained that when counsel ignores red flags and truncates a mitigation investigation prematurely, an informed decision deserving of deference is not possible. In light of the information Wiggins' counsel knew at the time they terminated their mitigation investigation, this Court concluded that "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. This early termination of the investigation rendered the lower court's "assumption that the investigation was adequate" an "unreasonable application of *Strickland*" and "the court's subsequent deference to counsel's strategic decision" "objectively unreasonable" because "counsel based this alleged choice on . . . an unreasonable investigation." *Id.* at 528.

The Sixth Circuit applied these rules to Mason's case, properly determining that counsel's narrow, abbreviated investigation was insufficient to insulate counsel's decision to abandon the investigation as an unreviewable "strategic" decision.

2. The Warden's claimed impact of the Sixth Circuit's opinion is based on an inaccurate characterization of the court's decision and an improper approach to the ineffective assistance of counsel analysis.

The Warden complains that the effect of the Sixth Circuit's decision was to place counsel in an "impossible position of having to choose between providing ineffective assistance in one of two ways." Pet. at 4. These allegations are unfounded. The Warden assumes: (1) that counsel would have been found ineffective if he had chosen the option of introducing mitigating evidence and risking the admission of unfavorable rebuttal evidence by the State in response; and (2) that the Sixth Circuit found him ineffective for instead choosing the alternative of refraining from introducing the mitigating evidence. But this catch-22 characterization of the implications of the panel's decision is wholly inaccurate.

The Sixth Circuit did *not* hold that Mason's trial counsel was ineffective for "failing to introduce mitigating evidence" during the penalty phase of his trial. Pet. at 4. Rather, the court held that counsel failed "to undertake a reasonable investigation to support [his] strategic decisions about the presentation of mitigation evidence," App. 34a, a decision fully consistent with law clearly established by this Court. As this Court recognized in *Wiggins*, if "the investigation supporting" counsel's alleged strategic choice "was unreasonable," then counsel simply was "not in a position to make a reasonable strategic choice" about the mitigation strategy. *Wiggins*, 539 U.S. at 536. *See also id.* at 522–23 (The "principal concern in deciding whether [counsel] exercised 'reasonable professional judgment,' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*.") (quoting *Strickland*, 466 U.S. at 691).

To be sure, federal habeas courts cannot second-guess the reasonable strategic decisions of trial counsel. The Sixth Circuit, however, concluded that Mason's trial counsel never was in a position to make a reasonable strategic decision because counsel had not conducted an investigation adequate to require the court's deference. Counsel's mistake, therefore, was not in choosing the lesser of two reasonable strategies; his mistake was in failing to be sufficiently informed to make a reasoned strategic choice in the first place.

Thus the Warden's protest erroneously focuses on the tradition that counsel's strategic decisions "'are virtually unchallengeable,'" Pet. at 13 (quoting *Strickland*, 466 U.S. at 690), while ignoring that courts apply this deferential standard *only* if the decisions are made "after thorough investigation of law and facts relevant to plausible options," *Strickland*, 466 U.S. at 690. On the other hand, "strategic choices made after less than complete investigation are reasonable precisely

to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. In all events, however, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

The framework of these governing standards demonstrates that the Warden's proposed approach to the analysis is backwards. The Warden defends trial counsel's decision to limit the mitigation presentation as a strategic choice and *then* suggests that counsel's "corresponding decision to limit his mitigation investigation accordingly" is entitled to deference. Pet. at 11. But the premise of the Warden's position — that the decision to limit the mitigation investigation flowed from a reasonable strategic decision — is flawed. The decision to limit the investigation was not reasonable because counsel did not fulfill the investigative duty recognized in *Strickland before* making that decision. An uninformed "strategic" decision cannot retroactively justify the very same limits on the investigation that made the decision unreasonable in the first place. Cf. *Wiggins*, 539 U.S. at 526–27 ("When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel's conduct than an accurate description of [his] deliberations prior to sentencing.").

The Warden also argues that "counsel's mitigation investigation was sufficient because Mason cannot identify any significant aspect of his background about which counsel was unaware before he selected a mitigation strategy." Pet. at 14. But once again, the Warden approaches the analysis improperly, attempting to import a prejudice consideration into the performance assessment. In doing so, the Warden tries to justify the reasonableness of counsel's decision to call off the mitigation investigation not with what counsel knew at the time he made the decision, but with what

he would have turned up had he decided differently. The Warden's attempt is unpersuasive. A hindsight "strategic" justification cannot change the fact that counsel's inadequate investigation had rendered him unable to make an informed tactical decision at the time he made it.

For these same reasons, the proper resolution of the evidentiary question concerning potential rebuttal evidence is irrelevant. First, the Sixth Circuit explained that it did not defer to the state court's evaluation of this issue because that court did not analyze a fair construction of Mason's argument, making the court's analysis objectively unreasonable. Rather than confronting Mason's actual argument — that his counsel should have introduced mitigating evidence about his *family background and troubled childhood* — the Ohio Supreme Court instead characterized the risk of rebuttal evidence as being implicated by mitigating evidence about Mason's "*good character and rehabilitation potential*." App. 341a (emphasis added). The Sixth Circuit properly held that the state court's rejection of its own strawman construction of the Mason's argument did not deserve AEDPA deference.

In addition, under an accurate formulation of Mason's argument, the Sixth Circuit persuasively explained why the law that allows a prosecutor to introduce evidence to rebut testimony that "'falsely or incompletely [characterizes] the extent of the defendant's *criminal record*'" would not have given the prosecutor an opportunity to rebut "testimony that purely concerned Mason's troubled childhood." App. 36a (quoting *State v. DePew*, 528 N.E.2d at 555)) (emphasis modified). And, "most likely because Mason's counsel never investigated Mason's childhood nor planned to present such evidence," the Sixth Circuit pointed out, the trial court never gave an opinion to the parties regarding the admissibility of the threatened evidence to rebut that type of testimony. App. 38a.

Even if the state courts would have decided that hypothetical evidentiary issue differently, however, Mason would still be entitled to relief. As the Sixth Circuit properly concluded, counsel was in no position to make an informed assessment about the comparative benefits of introducing mitigating evidence about his client's miserable home life. Without having sufficiently investigated the mitigating evidence, counsel could not have weighed the harmful evidence he knew against the helpful evidence he had failed to investigate. And as this Court recognized in *Williams*, where "not all of the additional evidence was favorable" to the defendant, "the failure to introduce the comparatively voluminous amount of evidence that did speak in [the defendant's] favor was not justified by a tactical decision to focus on" another mitigation approach because "[w]hether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4–55 (2d ed. 1980)). As the record in this case "underscores the unreasonableness of counsel's conduct by suggesting that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," *Wiggins*, 539 U.S. at 526, the Sixth Circuit correctly held that Mason has receive ineffective assistance of counsel, regardless of whether it correctly assessed the ancillary evidentiary issue.

B. ***Spisak's* issues are distinct from those involved in Mason's case and do not justify holding this petition pending a decision in that case.**

Alternatively, the Warden asks this Court to hold the petition pending its decision in *Smith v. Spisak*, No. 08-724, set for argument in October, 2009. The Warden, however, makes no serious attempt to link the issues in Mason's case with those in Spisak's. In fact, the Warden has also

asserted just the opposite. As the Warden has acknowledged in other briefing before this Court, the deficiencies the Sixth Circuit found in the performance of Spisak's counsel have nothing in common with the failure of Mason's counsel to adequately investigate potential mitigating evidence. *See* Brief of Petitioner at 42, *Smith v. Spisak*, No. 08-724 (filed May 22, 2009) ("In fact, the Sixth Circuit rejected Spisak's argument that counsel performed an inadequate mitigation investigation, finding that counsel had collected an extensive social history.") (internal quotation marks omitted). Indeed, in the Warden's words, Spisak's case stands "[i]n sharp contrast to" cases where habeas petitioners succeeded in establishing, among other claims, that counsel erred by conducting "an unreasonable mitigation investigation," because Spisak's "trial counsel . . . adequately investigated and presented Spisak's best chance of mitigation to the jury . . . ." *Id.* at 44 (internal quotation marks omitted). The Warden cannot have it both ways.

Even without the Warden's concession, it is apparent that the Sixth Circuit's analysis in Spisak's case focused on Spisak's entitlement to habeas relief not for an inadequate mitigation investigation, but "on the basis of counsel's hostile and inept statements and lack of advocacy during the closing argument of the mitigation phase of the trial." *Spisak v. Mitchell*, 465 F.3d 684, 708 (6th Cir. 2006). *See also Spisak v. Hudson*, No. 03-4034, 2008 U.S. App. LEXIS 7760, at *2 (6th Cir. April 11, 2008) (amended order) (explaining that the Sixth Circuit "found that Petitioner was prejudiced by his counsel's deficient performance at the sentencing phase of Petitioner's trial" because his "counsel's closing argument focused almost entirely on the heinous nature of Petitioner's crimes and his deficient nature as a person" and "in no way attempted to rehabilitate Petitioner in the eyes of the jurors who would eventually have to decide whether to recommend the death penalty"). Moreover, the Sixth Circuit specifically recognized that this Court "has now applied

Strickland in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate and present mitigating evidence at the sentencing phase of a death penalty trial constitutes ineffective assistance of counsel," *Spisak*, 465 F.3d at 707 (citing *Rompilla*, 545 U.S. at 383; *Wiggins*, 539 U.S. at 537–38; and *Williams*, 529 U.S. at 390), but held that it did not agree with Spisak that "trial counsel was ineffective in failing to properly investigate Defendant's background," *id.*

Finally, the Warden has asserted that the ineffective-assistance-of-counsel question presented by *Spisak* is whether the Sixth Circuit erred "when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing arguments," Brief of Petitioner at i, *Smith v Spisak*, No. 08-724 (filed May 22, 2009), and he has made no similar assertion that the Sixth Circuit wrongly applied *Cronic*, or any decision other than *Strickland* (and cases following it), in deciding Mason's case. Because this Court's decision in *Spisak* will not bear on the Sixth Circuit's analysis in Mason's case, it should not grant the Warden's request to hold the petition.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari, and also deny the Warden's alternative request to hold this petition pending its decision in *Spisak*.

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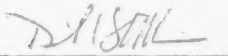
By: 
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No. 09-74

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

MAURICE A. MASON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

In spite of Respondent Maurice A. Mason's efforts to portray the Warden's petition as a request for mere error correction, Brief in Opposition ("Opp.") at 4, this case is worthy of certiorari for two reasons. First, far from straightforwardly applying *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, Opp. at 4, the Sixth Circuit set unreasonably high standards for the mitigation performance of trial counsel. Second, and no less important, this case is yet another example of the Sixth Circuit's disregard for the principles of comity and federalism that the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") protects. The appeals court rejected the Ohio courts' objectively reasonable resolution of Mason's claim of ineffective assistance at mitigation and instead substituted its own analysis of how *Strickland* should apply to these facts.

The Sixth Circuit's lack of deference to the reasoned strategic decisions of Mason's trial counsel is a far cry from the *Strickland* precept that counsel's strategic decisions "are virtually unchallengeable" if made after sufficient investigation of relevant law and facts. 466 U.S. at 690. It is true that counsel's strategic decisions are not entitled to this deference if they are unsupported by reasonable investigation. See *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). But the Sixth Circuit's opinion extends well beyond that principle to require counsel to continue investigating, even after selecting a reasonable mitigation strategy (supported by reasonable investigation) that renders additional investigation superfluous. In doing so, the Sixth Circuit essentially requires counsel to use valuable time and resources to continue investigating, apparently for the purpose of either

verifying or undermining a reasonable strategic decision that is already entitled to great deference. Mason's arguments that the Sixth Circuit has not imposed any such requirement hinge entirely on his incorrect conclusion that trial counsel did not investigate sufficiently before selecting a mitigation strategy in this case.

Moreover, as in *Smith v. Spisak*, 512 F.3d 852 (6th Cir. 2008), *cert. granted*, 2009 U.S. Lexis 1536 (Feb. 23, 2009), and other recent decisions, the Sixth Circuit has once again disregarded AEDPA's mandate to defer to state courts' reasonable resolution of claims. Instead, the Sixth Circuit improperly rejected the Ohio courts' resolution of Mason's ineffective assistance at mitigation claim and conducted an independent analysis of *Strickland*'s application to these facts.

The Court should grant review and reverse the Sixth Circuit's opinion ordering the issuance of a conditional writ. Alternatively, the Court should hold this petition pending its decision in *Spisak*.

A. In misapplying *Strickland* and its progeny, the Sixth Circuit established a new rule that trial counsel cannot limit a mitigation investigation in accord with a reasonable strategic decision.

1. Trial counsel had sufficient information to support his choice of mitigation strategy and his decision to abandon further background investigation.

Mason's trial counsel conducted sufficient investigation—even if it was not comprehensive—to

support his strategic decision, which means that his decision is entitled to great deference. When a habeas petitioner alleges that his trial counsel's mitigation strategy was not supported by sufficient investigation, this Court "focus[es] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of . . . background *was itself reasonable*." *Wiggins*, 539 U.S. at 523. A strategic decision made after incomplete investigation is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. But, like all other strategic decisions, courts "apply[] a heavy measure of deference" to counsel's decision not to investigate. *Id.*; see *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

Counsel reasonably investigated Mason's background before selecting a mitigation strategy. As detailed in the Warden's petition, counsel was aware of each potentially significant aspect of Mason's family background before he decided on a strategy and discontinued investigation, with the sole exception that counsel may not have known of Mason's father's involvement with prostitution. Petition for Certiorari ("Pet.") at 15-19.

Mason argues that the Warden's focus on the information known and not known to trial counsel at the time of his strategic decision improperly conflates the two prongs of *Strickland*, Opp. at 18-19, but the Warden's argument is based purely on *Strickland*'s first prong. This Court has long made clear that counsel's strategic decisions "are virtually unchallengeable" if "made after thorough investigation of law and facts relevant to plausible

options." *Strickland*, 466 U.S. at 690. To determine whether a strategic decision is unchallengeable, a court must therefore consider what counsel knew at the time of the decision. Here the Sixth Circuit found that trial counsel's mitigation investigation was inadequate without identifying any significant evidence about which counsel was unaware. See App. 52a (Boggs, C.J., dissenting).

Counsel knew enough about Mason's background to identify potential mitigation avenues, and "there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Burger v. Kemp*, 483 U.S. 776, 795 (1987). Accordingly, his "decision not to mount an all-out investigation into petitioner's background in search of mitigation circumstances was supported by reasonable professional judgment." *Id.* at 794. Counsel's termination of investigation was the product not of "procrastination and inattention," as Mason suggests, Opp. at 3, but rather of reasoned strategic judgment.

2. Trial counsel's mitigation strategy was objectively reasonable.

The Sixth Circuit afforded no deference to trial counsel's objectively reasonable mitigation strategy, let alone a strong presumption of reasonableness. Mason contends that this lack of deference was appropriate because counsel had not conducted sufficient investigation before selecting a strategy, Opp. at 15-16, but that argument fails for the reasons explained above. Instead, the relevant question is whether, in light of the investigation conducted, counsel's decision to reject a particular

mitigation strategy—and his corresponding decision to forgo additional investigation—was reasonable. Because that decision was reasonable, it is entitled to substantial deference.

This Court has recognized at least two reasons why trial counsel might reasonably choose a mitigation strategy that avoids introducing evidence of a defendant's "troubled family background": (1) when the evidence in question is "by no means uniformly helpful" to the defendant, and (2) where counsel reasonably "concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence." *Burger*, 483 U.S. at 792-93. Moreover, this Court has specifically recognized that it can be sound strategy to withhold potentially mitigating evidence to prevent the introduction of damaging rebuttal evidence. *Darden v. Wainwright*, 477 U.S. 168, 186-87 (1986). In other words, as long as counsel adopts this mitigation strategy after carefully weighing the benefits of mitigating evidence against the risks of possible rebuttal evidence, the strategy is presumed to be reasonable.

Mason's trial counsel selected an objectively reasonable mitigation strategy in the face of a significant dilemma. He knew the prosecution wanted to introduce evidence of Mason's criminal history and past drug use. More important, he was particularly concerned about the prosecution's evidence that Mason had raped and threatened a young woman "similar aged to the victim of this case" only "three or four months before this alleged incident." J.A. 1711. Counsel also knew that Ohio law permits a prosecutor "to rebut mitigation

evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false," *Ohio v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988), and he reasonably believed the trial judge had a "hair trigger" approach to allowing rebuttal evidence, J.A. 1737. Thus, even though counsel's mitigation investigation had revealed that Mason's background might be useful in mitigation, counsel had to decide whether the benefits of that evidence outweighed the risk of opening the door to highly damaging rebuttal evidence.

In choosing a mitigation strategy, counsel considered not only the mitigating evidence of family background he had already uncovered at the time, but also all potential family background evidence that further investigation might uncover. In other words, counsel recognized in his balancing that a variable existed on the mitigating side of the equation. But he concluded that, whatever the unknown variable was, it could not be great enough to overcome the other side of the equation—the earlier rape. Counsel believed the evidence of Mason's prior rape was damning enough that he wanted to prevent it from getting to the jury at all costs. Believing "the rebuttal [was] stronger than any mitigation" he would get out of Mason's background or Dr. Spare's testimony, counsel decided the risks outweighed the benefits and selected a mitigation strategy that did not involve Mason's background. J.A. 1736.

This reasonable strategic decision is entitled to great deference even if there was only a reasonable *possibility* that presenting evidence of Mason's background would allow the prosecutor to

introduce evidence of Mason's prior rape. Counsel was not obligated to risk an adverse evidentiary ruling on that issue in hopes of reversal on appeal. See App. 57a (Boggs, C.J., dissenting). And, here, counsel reasonably believed that the trial court would allow the State's rebuttal evidence.

Counsel also undoubtedly knew that evidence of Mason's background could cut both ways. Any attempt to portray sympathetically Mason's long history of drug use, drug dealing, running away, and criminal activity would almost certainly have been met with the state's alternative portrayal. Moreover, as Chief Judge Boggs noted in his dissent, "it is entirely possible that, had defense counsel pursued a mitigation strategy that relied on extensively describing Mason's character and background, one of the family members might accidentally have commented in some way on Mason's criminal history, which would have opened the door to the disastrous rebuttal evidence even under the [Sixth Circuit's] reading of *DePew*." *Id.*

3. The Sixth Circuit opinion places counsel in the untenable position of having to continue investigating even after selecting a reasonable mitigation strategy that obviates the need for further investigation.

As the Warden's petition explains, the Sixth Circuit's decision raises the *Strickland* bar for counsel's mitigation performance to an unprecedented level. Pet. at 25. Counsel would have to devote significant time and resources to mitigation investigation even when they know they will not be able to use the fruits of the investigation. Here,

counsel conducted a reasonable mitigation investigation into Mason's family background before making a strategic decision to avoid presenting evidence of family background in mitigation. Counsel reasonably decided not to expend further time and resources investigating aspects of Mason's life that would never be introduced at sentencing. But the Sixth Circuit has now established a new requirement that counsel must continue to investigate a mitigation area even after selecting a reasonable strategy that would not include the evidence.

By requiring counsel to continue investigating potential mitigating evidence that has been rendered moot by a reasonable strategic decision, the Sixth Circuit limits the degree of deference afforded by *Strickland*. Essentially, the Sixth Circuit is calling for counsel to investigate further simply to confirm the correctness of a chosen strategy. This ideal, however laudable, is impracticable. More to the point, this standard far exceeds *Strickland*'s relatively low bar for effective assistance of counsel. See 466 U.S. at 689.

B. The Sixth Circuit again has disregarded AEDPA's mandate of deference to state courts by rejecting both the Ohio courts' reasonable resolution of Mason's claim and their interpretation of Ohio law.

The Sixth Circuit has once again ignored AEDPA's mandate that federal habeas courts afford great deference to state court judgments. The Ohio courts properly identified the law of ineffective assistance and applied that law when evaluating Mason's claim. Even if the Ohio courts' ineffective

assistance analysis were wrong—and it was not—AEDPA permits federal habeas relief only if the analysis was objectively *unreasonable*. See 28 U.S.C. § 2254(d)(1). The Sixth Circuit did not demonstrate objective unreasonableness; it simply declined to defer to the Ohio courts' reasonable findings.

Mason erroneously contends that the state courts' decision was objectively unreasonable because the Ohio Supreme Court misconstrued his ineffective assistance argument. Opp. at 19. According to Mason, the Ohio Supreme Court evaluated only the risk of rebuttal evidence implicated by mitigating evidence of Mason's good character and rehabilitation potential—not the risk of rebuttal evidence implicated by evidence about Mason's family background. But the Ohio Supreme Court correctly understood the scope of Mason's argument, see App. 340a ("Mason argues that his counsel failed to investigate and present a life history of Mason and his psychological background."), and it extended its analysis beyond evidence of good character and rehabilitation potential. The state court specifically concluded that "it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare"—which included discussion of Mason's family background—"in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation." App. 341a.

Because the Ohio Supreme Court did not misconstrue Mason's ineffective assistance claim, the Sixth Circuit should have deferred to the court's broad holding. Instead, the federal court independently evaluated Mason's ineffective

assistance claim for itself. In doing so, the Sixth Circuit misinterpreted Ohio's evidentiary laws governing the admissibility of rebuttal evidence during mitigation. See Pet. at 28-30.

The Sixth Circuit similarly declined to defer to the Ohio Supreme Court's objectively reasonable conclusion that Mason did not suffer actual prejudice as a result of counsel's allegedly deficient performance. App. 45a. On direct review, the Ohio Supreme Court concluded that Mason could not prevail on a claim of ineffective assistance at mitigation because he had failed to establish "a reasonable probability that different tactical choices at the penalty phase would have made a difference in the result." App. 341a (internal quotation and citation omitted). Because counsel's strategy *turned on* avoiding damaging rebuttal evidence, he would never have introduced any family background evidence no matter how much additional investigation he conducted. Accordingly, the Ohio Supreme Court concluded that any alleged failing in counsel's mitigation investigation did not cause prejudice under *Strickland*.

The Sixth Circuit's disagreement with the Ohio Supreme Court's prejudice analysis rests entirely on its disagreement with the Ohio Supreme Court's analysis of Ohio's evidentiary laws. App. 46a. But even if trial counsel and the Ohio Supreme Court were both mistaken in their interpretation of Ohio's evidentiary laws, counsel's concern about avoiding dangerous rebuttal evidence was justified. See *supra* at 6-7. It was therefore objectively reasonable for the Ohio Supreme Court to consider

the specter of rebuttal evidence when analyzing the prejudice prong of *Strickland*.

C. As in *Spisak*, the Sixth Circuit refused to defer to the Ohio courts' reasoned judgment about an ineffective assistance of counsel claim.

Mason contends that there is no reason to hold this case for *Spisak*, 512 F.3d 852, because significant differences exist between the two cases. Opp. at 20-22. Specifically, Mason emphasizes that *Spisak* does not involve a claim of inadequate mitigation investigation. Opp. at 21. But Mason ignores the broader similarities between the two cases.

This case should be held for *Spisak* because the Sixth Circuit repeated here the same errors it made in *Spisak*. In both cases, the Ohio courts properly identified and reasonably applied this Court's clearly established law governing ineffective assistance claims. In both cases, the Sixth Circuit refused to defer to the Ohio courts' reasonable rejection of the petitioners' ineffective assistance claims and instead conducted a de novo evaluation of how *Strickland* applied to the facts. And in both cases, the Sixth Circuit neglected to undertake a proper analysis of whether the Ohio courts' resolutions of the *Strickland* claims were objectively unreasonable. This Court's decision in *Spisak*, then, will likely bear on the Sixth Circuit's deficient analysis here.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should hold this petition pending its decision in *Spisak*.

Respectfully submitted,

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